

University of Nebraska - Lincoln

DigitalCommons@University of Nebraska - Lincoln

---

College of Law, Faculty Publications

Law, College of

---

2012

## WHISTLEBLOWERS AND THE OBAMA PRESIDENCY: THE NATIONAL SECURITY DILEMMA

Richard Moberly

*University of Nebraska College of Law, [rmoberly2@unl.edu](mailto:rmoberly2@unl.edu)*

Follow this and additional works at: <https://digitalcommons.unl.edu/lawfacpub>

---

Moberly, Richard, "WHISTLEBLOWERS AND THE OBAMA PRESIDENCY: THE NATIONAL SECURITY DILEMMA" (2012). *College of Law, Faculty Publications*. 153.

<https://digitalcommons.unl.edu/lawfacpub/153>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in College of Law, Faculty Publications by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

# WHISTLEBLOWERS AND THE OBAMA PRESIDENCY: THE NATIONAL SECURITY DILEMMA

BY  
RICHARD MOBERLY\*

I. INTRODUCTION .....	52
II. OBAMA'S NUANCED APPROACH TO WHISTLEBLOWING .....	55
A. <i>Obama's Support for Whistleblowers Generally</i> .....	55
1. Presidential Appointments .....	55
a. Merit Systems Protection Board .....	56
b. Office of Special Counsel .....	58
c. Administrative Review Board .....	60
2. Legislation .....	66
a. Stimulus Bill .....	66
b. Health Care Reform .....	68
c. Wall Street Reform .....	68
d. Other Legislation .....	71
B. <i>National Security: The Great Exception</i> .....	72
1. Statements from Obama's Administration .....	73
2. Actions by Obama's Administration .....	75
a. Criminal Prosecutions of Whistleblowers .....	75
b. Avoiding Better Statutory Protections .....	80
c. Journalist Subpoenas .....	86
III. WHISTLEBLOWING, NATIONAL SECURITY, AND THE SEPARATION OF POWERS .....	89
A. <i>Valuing Oversight and Transparency over Secrecy</i> .....	92
B. <i>Switching the Balance for National Security Whistle-         blowing</i> .....	95

\* Professor of Law, University of Nebraska College of Law. I appreciate the helpful comments from Jack Beard, Eric Berger, Steve Bradford, Susan Poser, Kevin Ruser, Robert Vaughn, Steve Willborn, the participants at the Sixth Annual Labor and Employment Law Colloquium at Southwestern Law School in Los Angeles, CA, and the faculty at the Nebraska College of Law who attended a colloquium presentation of this paper. Caleb Dutson, Ryan Sullivan, and Nick Thielen provided excellent research assistance. A McCollum Research Grant provided support for the research and writing of this article. In 2008, I served on two Obama for President Expert Policy Committees: the Government Reform Policy Committee and the Labor and Employment and Workforce Policy Committee; however, I did not provide advice on national security whistleblower policy and the opinions expressed herein are my own.

1. The Classification System for National Security Information .....	96
2. Limited Antiretaliation Protection .....	101
3. Structural Disclosure Channels .....	106
IV. PROVIDING A BETTER BALANCE .....	111
A. <i>The National Security Whistleblowing Dilemma</i> .....	114
B. <i>Suggestions for Reform</i> .....	121
1. Enhanced Disclosure Channels .....	122
2. Retaliation Protection.....	129
3. Whistleblowing as a Duty.....	133
4. Extreme Cases .....	136
V. CONCLUSION.....	140

## I. INTRODUCTION

Whistleblower advocates generally cheered Barack Obama's election in 2008 because they had a "longtime friend" ascending to the Presidency.<sup>1</sup> Before entering public service, Obama represented a qui tam whistleblower as an attorney, and then, as both a state senator and a U.S. senator, Obama supported whistleblower protection legislation.<sup>2</sup> As a candidate for President, Obama reiterated his support for expanded whistleblower protections.<sup>3</sup> Most importantly, as President-Elect, Obama promised to reinvigorate ethics in government, and part of his plan included increased protections for whistleblowers. Before he took office, the Obama-Biden transition team stated,

[o]ften the best source of information about waste, fraud, and abuse in government is an existing government employee committed to public integrity and willing to speak out. Such acts of courage and patriotism, which can sometimes save lives and often save taxpayer dollars, should be encouraged rather than stifled. We need to empower federal employees as watchdogs of wrongdoing and partners in performance. Barack Obama will strengthen whistleblower laws

1. Joe Davidson, *Joe Davidson's Federal Diary: Whistleblowers May Have Friend in Oval Office*, WASH. POST, Dec. 11, 2008, at D3; see also TOM DEVINE & TAREK F. MAASSARANI, *THE CORPORATE WHISTLEBLOWER'S SURVIVAL GUIDE* 183 (2011) ("The Obama Administration's arrival brought high expectations that times are, indeed, a-changin'."); Megan Chuchmach & Rhonda Schwartz, *Will Obama Keep His Promise to Federal Whistleblowers?*, ABC NEWS (Aug. 4, 2009), <<http://abcnews.go.com/Blotter/story?id=8241580&page=1>>.

2. Chuchmach & Schwartz, *supra* note 1; Davidson, *supra* note 1.

3. Letter from Barack Obama to The National Academies (Oct. 9, 2008), available at <[obama.3cdn.net/08fe869a2e4de42af1\\_zam6b5vn2.pdf](http://obama.3cdn.net/08fe869a2e4de42af1_zam6b5vn2.pdf)> ("I will strengthen protections for 'whistleblowers' who report on any government attempts to distort or ignore scientific research.").

to protect federal workers who expose waste, fraud, and abuse of authority in government. Obama will ensure that federal agencies expedite the process for reviewing whistleblower claims and whistleblowers have full access to courts and due process.<sup>4</sup>

In many ways, President Obama has lived up to his promised support for whistleblowers. Obama's appointments to key administrative positions in charge of whistleblower protection consistently supported employee rights and worked steadily to unravel the long-standing anti-whistleblower bias in those agencies.<sup>5</sup> Moreover, the three most prominent pieces of Obama's legislative agenda – the economic stimulus package, the financial reform bill, and health care reform – all included key provisions that enhanced whistleblower protections.<sup>6</sup>

However, the Obama Administration's record regarding whistleblower protection for *national security* whistleblowers has been decidedly less emphatic and more nuanced.<sup>7</sup> Indeed, the Obama Administration has been accused of conducting a “war on whistleblowers,” because of its aggressive prosecution of leaks related to national security.<sup>8</sup> Obama's Department of Justice (DOJ) prosecuted six people who allegedly disclosed sensitive information to non-governmental entities (such as the media) under the Espionage Act, a statute typically used to prosecute disclosure of national secrets to foreign governments – more such prosecutions than all previous administrations combined.<sup>9</sup> Moreover, Obama's Administration has continued the

4. *Agenda · Ethics*, CHANGE.GOV <[http://change.gov/agenda/ethics\\_agenda/](http://change.gov/agenda/ethics_agenda/)> (last visited Apr. 16, 2012).

5. See discussion *infra* Part II.A.1.

6. See discussion *infra* Part II.A.2.

7. See Jane Mayer, *The Secret Sharer*, THE NEW YORKER, May 23, 2011, at 47, 48 (asserting that President Obama has drawn a “sharp distinction between whistle-blowers who exclusively reveal wrongdoing and those who jeopardize national security”).

8. Glenn Greenwald, *The DOJ's Creeping War on Whistle-Blowers*, SALON (Feb. 25, 2011, 7:26 AM CDT), <[http://www.salon.com/2011/02/25/whistleblowers\\_4/](http://www.salon.com/2011/02/25/whistleblowers_4/)>; Scott Horton, *Obama's War on Whistleblowers*, HARPER'S MAGAZINE (Aug. 31, 2010, 1:33 PM), <<http://www.harpers.org/archive/2010/08/hbc-90007562>>; see also Conor Friedersdorf, *The Obama Administration's Whistleblower Problem*, THE ATLANTIC (June 30, 2011, 7:10 AM ET) <<http://www.theatlantic.com/politics/archive/2011/06/the-obama-Administrations-whistleblower-problem/241262/>> (noting that the Obama Administration, “for reasons big and small, fair and possibly unfair, . . . has acquired a reputation for retaliating against whistleblowers”); Josh Gerstein, *Justice Dept. Cracks Down on Leaks*, POLITICO (May 25, 2010, 4:44 AM EDT) <<http://www.politico.com/news/stories/0510/37721.html>> (“President Barack Obama's Justice Department has taken a hard line against leakers, and Obama himself has expressed anger about disclosures of national security deliberations in the press.”).

9. Charlie Savage, *Ex-C.I.A. Officer Charged in Information Leak*, N.Y. TIMES, Jan. 23, 2012, at A1; Scott Shane, *U.S. Pressing Its Crackdown Against Leaks*, N.Y. TIMES, June 18, 2011, at A1; discussion *infra* Part II.B.2.

Bush Administration's attempts to coerce reporters into identifying the sources of national security leaks.<sup>10</sup> Further, his support for statutory improvements to antiretaliation laws varies depending on whether the proposed protection affects whistleblowers in the intelligence community.<sup>11</sup>

This Article explores President Obama's seemingly contradictory approach to whistleblowers and the distinction he appears to draw between whistleblowing about governmental misconduct generally, which he supports, and whistleblowing in the national security context, which he appears to disdain. Part II of the Article describes the numerous moves Obama made to improve whistleblower protection through his Presidential appointments and his support of improved antiretaliation statutory measures. Additionally, this Part contrasts that support with Obama's seemingly antagonistic approach to whistleblowing about national security.

At least two questions arise from drawing this distinction between national security whistleblowing and other types of whistleblowing. First, where does the distinction come from? Second, does the distinction make sense?

Part III answers the first question by examining why Obama might approach national security whistleblowing differently than other types of whistleblowing. In some respects, this different approach continues a long-standing separation of powers dispute between the legislative and the executive branches of the federal government. Congress desires transparency and oversight of the executive branch, which it hopes to achieve by encouraging executive branch employees to disclose information to Congress. Presidents traditionally have resisted these efforts, particularly when they involve matters over which the Constitution arguably has empowered the President with exclusive domain, such as protecting secrecy related to national security. The state of the law related to national security whistleblowers reflects this dispute in that such whistleblowers generally receive far fewer protections than other types of whistleblowers. In short, President Obama values secrecy over transparency and oversight when it comes to national security whistleblowing, and the law often reflects and supports this choice.

Part IV responds to the second question – does this distinction make sense? – by analyzing whether President Obama and the cur-

10. See discussion *infra* Part II.B.2.

11. See *id.*

rent state of the law correctly balance the competing goals of secrecy and security on the one hand and transparency and oversight on the other. Although reasons certainly exist to treat national security whistleblowers differently than other whistleblowers, I argue in this Part that the law could be modified to increase transparency and oversight without a corresponding negative impact on secrecy and national security. I conclude the Article with several suggestions to re-balance the scales and to provide national security employees appropriate encouragement to blow the whistle on governmental misconduct.

## II. OBAMA'S NUANCED APPROACH TO WHISTLEBLOWING

Every government has an interest in concealment; every public, in greater access to information. In this perennial conflict, the risks of secrecy affect even those administrators least disposed at the outset to exploit it. How many leaders have not come into office determined to work for more open government, only to end by fretting over leaks . . . .

*Sissela Bok (1982)*<sup>12</sup>

### A. Obama's Support for Whistleblowers Generally

In several important respects, President Obama has supported whistleblowers as he promised during the campaign.

#### 1. Presidential Appointments

First, President Obama appointed supporters of whistleblower rights to key administrative positions involved in protecting whistleblowers.<sup>13</sup> At least one whistleblower advocate felt that Obama's appointments were "a weathervane that the Obama Administration is serious about its good government rhetoric."<sup>14</sup> This same advocate asserted that the President appointed "the strongest, most qualified team in history to protect government and corporate whistleblowers."<sup>15</sup>

12. SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 177 (1982).

13. Whistleblower advocacy groups greeted these nominations with acclaim, likely indicating the extent to which these appointments support whistleblowers generally. *See, e.g.*, Press Release, Gov't Accountability Project, GAP Executive Director to Become Deputy Special Counsel (June 15, 2011), *available at* <<http://www.whistleblower.org/press/press-release-archive/1195-gap-executive-director-to-become-deputy-special-counsel>> ("The Obama Administration has appointed a very strong team to lead the agencies that implement whistleblower laws.").

14. Chuchmach & Schwartz, *supra* note 1 (quoting Tom Devine of GAP).

15. *See* Tom Devine, *GAP Praises Confirmation of New Special Counsel Lerner*, GOV'T

## a. Merit Systems Protection Board

For example, in 2009, Obama appointed Susan Tsui Grundmann as Chairman of the Merit Systems Protection Board (MSPB) and Anne Marie Wagner as Vice Chairman. The MSPB hears appeals from administrative judges of complaints by federal employees, including whistleblowers, related to the Civil Service Reform Act of 1978 (CSRA) and the amendments to that act in the Whistleblower Protection Act of 1989 (WPA).<sup>16</sup> Grundmann was the general counsel for the National Federation of Federal Employees, and Wagner had been the general counsel for the Personal Appeals Board of the U.S. Government Accountability Office.<sup>17</sup> These appointments in particular signaled hope for whistleblowers because the MSPB under President Bush's nominees routinely ruled against whistleblowers: by one count the Bush MSPB found for a whistleblower in only one out of forty-five cases.<sup>18</sup>

Although it may still be early to completely assess the effect of these nominations, some moves by the new MSPB indicate a reversal of the old Board's harsh stance towards whistleblowers. By January 2011, one year into the new Board's tenure, whistleblowers had won half (four of eight) of the cases brought to the full MSPB.<sup>19</sup> One of the most visible of those cases, involving Washington D.C. Park Police Chief Theresa Chambers, highlights the Board's new approach under Obama's nominees. The Department of Interior had fired Chambers

ACCOUNTABILITY PROJECT (Apr. 15, 2011), <<http://www.whistleblower.org/blog/31-2010/1068-gap-praises-confirmation-of-new-special-counsel-lerner>>.

16. See *About MSPB*, U.S. MERIT SYS. PROTECTION BD., <<http://mspb.gov/About/about.htm>> (last visited Apr. 16, 2012). The CSRA, as amended by the WPA, provides retaliation protection to certain federal employees who report specific types of misconduct within the executive branches of the federal government.

17. Chuchmach & Schwartz, *supra* note 1.

18. *Id.* ("Unlike Bush Administration appointees who compiled a 1-44 track record against whistleblowers, these leaders are seasoned veterans with a proven track record of commitment to the merit system throughout their careers." (quoting Tom Devine from GAP)). The MSPB's miserable track record for whistleblowers actually goes further back than President G.W. Bush; Tom Devine testified to Congress that in 2,000 cases between 1979 and 1988, the Board ruled for whistleblowers four times on the merits. See *Protecting the Public from Waste, Fraud and Abuse: Hearing on H.R. 1507, The Whistleblower Protection Enhancement Act of 2009 Before the H. Comm. on Oversight & Gov't Reform*, 111th Cong. 11 (2009) (statement of Thomas Devine, Government Accountability Project) [hereinafter Devine Statement], available at <<http://democrats.oversight.house.gov/images/stories/documents/20090513183928.pdf>>. Since 2000, whistleblowers have won three out of 56 cases. See *id.*

19. Tom Devine, *MSPB Turnaround Highlights Problems with Administrative Judge System*, GOV'T ACCOUNTABILITY PROJECT (Feb. 1, 2011), <<http://www.whistleblower.org/blog/31-2010/971-mspb-turnaround-highlights-problems-with-administrative-judge-system>>. Tom Devine stated that "[f]or whistleblowers, to date the [new] Board's leadership has been turning on the lights after the Dark Ages." *Id.*

for disclosing that cutbacks in the Park Police budget resulted in increased public safety problems.<sup>20</sup> After previous Boards and the Federal Circuit earlier rejected Chambers' claims, the Obama MSPB overturned these decisions, restored her to her previous position, and awarded her backpay.<sup>21</sup> In another early case under the new Board, the MSPB found that the WPA protected whistleblower disclosures even if the disclosures violated an agency policy of confidentiality.<sup>22</sup> Also, in 2011, the Board issued favorable rulings for whistleblowers, or vacated and remanded administrative judge decisions against whistleblowers, in at least seven cases – an extraordinary number given its previous record.<sup>23</sup>

In addition to issuing favorable rulings, Obama's MSPB appointees also signaled their understanding that whistleblower protection remains an important aspect of the Board's responsibility. For example, in December 2010, the Board released a detailed report on the status of federal employee whistleblower protections and the "difficulties" a whistleblower must overcome to receive protection.<sup>24</sup> Although the Board carefully did not take a position on whether the law should be changed,<sup>25</sup> the Board paved the way for legislative reform by highlighting the deficiencies in the current legal regime.<sup>26</sup> The

20. See *Chambers v. Dep't of Interior*, 2011 M.S.P.B. 7 ¶¶ 3-6 (2011).

21. See *id.* ¶¶ 49-50.

22. See *Parikh v. Dep't of Veterans Affairs*, 2011 M.S.P.B. 1 ¶¶ 18-19 (2011).

23. See *King v. Dep't of Army*, 2011 M.S.P.B. 83 ¶¶ 5-7 (2011) (finding that the WPA protects employees whose agencies *perceive* them to be whistleblowers, even if the employee never actually blew the whistle; and finding that the ALJ should have told the employee about the possibility of making a claim as a perceived whistleblower); *Ingram v. Dep't of Army*, 2011 M.S.P.B. 71 ¶¶ 4-6 (2011) (finding that employee had engaged in protected conduct when he objected to a department event the employee claimed would have violated ethical regulations and potentially reveal trade secrets of agency contractors); *Usharauli v. Dep't Health & Human Servs.*, 2011 M.S.P.B. 54 ¶¶ 6-8 (2011) (finding that refusing to reappoint an employee and placing the employee on administrative leave are "personnel actions" under 5 U.S.C. § 2302(a)(2)(A) (2006) that could form the basis for a retaliation claim); *Vaughn v. Dep't of Agriculture*, 2011 M.S.P.B. 48 ¶¶ 5-7 (2011) (overturning an ALJ and finding that an agency had not fully complied with the Board's previous order in favor of a whistleblower); *Peterson v. Dep't of Veterans Affairs*, 2011 M.S.P.B. 38 ¶¶ 3-11 (2011) (finding that an ALJ improperly dismissed a whistleblower's claim at the pleading stage); *Mason v. Dep't Homeland Sec.*, 2011 M.S.P.B. 39 ¶¶ 8-12 (2011) (vacating and remanding whistleblower case because the ALJ should have concluded that an employee engaged in protected conduct); *Hamilton v. Dep't of Veterans Affairs*, 2011 M.S.P.B. 35 ¶¶ 14-15 (2011) (vacating and remanding case because ALJ should have found that whistleblowing played a contributing factor in the employee's removal).

24. MERIT SYS. PROTECTION BD., WHISTLEBLOWER PROTECTIONS FOR FEDERAL EMPLOYEES, at unnumbered 2 (2010), available at <<http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=557972%20&version=559604&application=ACROBAT>>.

25. See *id.* at 2.

26. See *id.* at unnumbered 2 ("This report spells out in greater depth the difficulties a potential whistleblower may face when navigating the law to seek protection from agency retaliation.").



Board also surveyed federal employees generally on their perceptions of various prohibited personnel practices, including whistleblowing,<sup>27</sup> and, most recently, released the results of a study examining whistleblowing in more detail, including how to encourage more employees to report misconduct.<sup>28</sup> At a minimum, then, the Obama MSPB appointees have taken their call to protect whistleblowers seriously and indicated that whistleblowers might actually have success through the administrative process set up by the CSRA and the WPA – propositions that many whistleblowers would have found hard to believe during previous administrations.<sup>29</sup>

#### b. Office of Special Counsel

Obama's appointments to the Office of Special Counsel (OSC) provide more examples. The OSC exists to protect federal government whistleblowers and to investigate their disclosures.<sup>30</sup> During the Bush presidency, the OSC did little to fulfill these roles, leading some whistleblower advocates to call it "dysfunctional."<sup>31</sup> OSC employees filed a formal complaint against Bush's Special Counsel, Scott Bloch, for issuing a gag order prohibiting employees from talking to anyone outside OSC about sensitive internal matters without prior clearance – an order that likely violated the First Amendment and federal law permitting employees to give information to Congress.<sup>32</sup> He also summarily dismissed hundreds of whistleblower cases in order to clear a backlog of pending matters.<sup>33</sup> Adding insult to injury, Bloch later resigned in disgrace amid charges that he had retaliated against

27. See generally MERIT SYS. PROTECTION BD., PROHIBITED PERSONNEL PRACTICES: EMPLOYEE PERCEPTIONS 32-33 (2011), available at <<http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=634680&version=636592&application=ACROBAT>>.

28. See generally MERIT SYS. PROTECTION BD., BLOWING THE WHISTLE: BARRIERS TO FEDERAL EMPLOYEES MAKING DISCLOSURES (2011), available at <<http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=662503&version=664475&application=ACROBAT>>.

29. This is not to say that the administrative process for federal whistleblowers works well. Tom Devine has argued that even though the MSPB has become more open to whistleblower complaints, the ALJs who adjudicate an employee's initial hearing remain hostile to whistleblowers. See Devine, *supra* note 19.

30. See *Introduction to OSC*, U.S. OFFICE OF SPECIAL COUNSEL, <<http://www.osc.gov/Intro.htm>> (last visited Apr. 16, 2012).

31. PROJECT ON GOV'T OVERSIGHT, HOMELAND AND NATIONAL SECURITY WHISTLEBLOWER PROTECTIONS: THE UNFINISHED AGENDA 13 (2005); see also Joe Davidson, *Federal Diary: Whistleblowers Get a Defender*, WASH. POST, Oct. 18, 2011, at B4 ("OSC is an independent federal agency with a long and well-deserved reputation for failing to protect federal whistleblowers.").

32. See Peter Katel, *Protecting Whistleblowers*, 16 CQ RESEARCHER 265, 278 (2006).

33. See PROJECT ON GOV'T OVERSIGHT, *supra* note 31, at 13-14.

whistleblowers in his own office.<sup>34</sup>

In June 2011, after leaving the Special Counsel position vacant for several years, Obama appointed as Special Counsel Carolyn Lerner, an experienced plaintiff's civil rights lawyer.<sup>35</sup> Lerner subsequently appointed Mark Cohen, the Executive Director of the Government Accountability Project (GAP), a whistleblower advocacy group, to become Deputy Special Counsel. The GAP President announced that "[t]his is a time of celebration for whistleblowers everywhere. . . . [Cohen] is exactly the kind of whistleblower advocate who should be working in the Office of Special Counsel."<sup>36</sup>

Within months of their appointments, Lerner and Cohen immediately altered the direction of the OSC by asking the Merit Systems Protection Board to prevent federal agencies from taking adverse personnel actions against two alleged whistleblowers,<sup>37</sup> an action the MSPB granted less than a week later.<sup>38</sup> Lerner stated that the unprecedented actions "make clear that this agency will vigorously protect federal employees against retaliation when they blow the whistle."<sup>39</sup> The National Whistleblowers Center remarked that the move "marks the beginning of new assertiveness by the OSC, and new grounds for optimism by federal employees at every level."<sup>40</sup> Indeed, the Department of Defense ultimately reinstated the security clearance of one whistleblower, allowing him to return to work.<sup>41</sup> This whistleblower,

34. See Joe Davidson, *Workers Applaud Special Counsel's Return to Private Sector*, WASH. POST, Oct. 22, 2008, at B4; Robert Brodsky, *White House Forces OSC Chief Out*, GOV EXEC.COM (Oct. 23, 2008), <<http://www.govexec.com/oversight/2008/10/white-house-forces-osc-chief-out/27911/>> (last visited Apr. 16, 2012). Bloch pled guilty to contempt of Congress after he had his computer hard drive erased when Congress began to investigate those allegations. Davidson, *supra* note 31. Subsequently, he successfully withdrew his guilty plea because he claimed he was not fully informed that his conviction would result in a mandatory jail sentence. *Id.*

35. See Carolyn Lerner, U.S. OFFICE OF SPECIAL COUNSEL, <<http://www.osc.gov/Lerner.htm>> (last visited Apr. 16, 2012).

36. Press Release, Gov't Accountability Project, GAP Executive Director to Become Deputy Special Counsel (June 15, 2011), available at <<http://www.whistleblower.org/press/press-release-archive/2011/1195-gap-executive-director-to-become-deputy-special-counsel>>.

37. Press Release, Office of Special Counsel, OSC Seeks Quick Action to Protect Two Public Health and Safety Whistleblowers (Oct. 8, 2011), available at <[www.osc.gov/documents/press/2011/pr11\\_17du.pdf](http://www.osc.gov/documents/press/2011/pr11_17du.pdf)>.

38. See Special Counsel ex. rel. Hardy v. Dep't of Health & Human Servs., No. CB-1208-12-0002-U-1 (MSPB Oct. 14, 2011); Special Counsel ex. rel. Gayl v. Dep't of Navy, No. CB-1208-12-0001-U-1 (MSPB Oct. 13, 2011).

39. Press Release, Office of Special Counsel, *supra* note 37, at 2.

40. Nick Schwellenbach, Special Counsel Seeks Protection for Two Whistleblowers (Oct. 10, 2011), <<http://pogoblo.typepad.com/pogo/2011/10/special-counsel-seeks-protection-for-two-whistleblowers.html>> (quoting Richard Renner).

41. See Press Release, Govt. Accountability Project, MRAP Whistleblower to Return to Work (Nov. 16, 2011), <<http://www.whistleblower.org/press/press-release-archive/1592-mrap->

Franz Gayl, who reported the Marines for failing to provide protective armor for vehicles in Iraq, stated:

The Office of Special Counsel (OSC) has been transformed under the inspiring leadership of Carolyn Lerner. Since her arrival in the summer of 2011 OSC has truly come to fulfill its intended mission as a Federal guardian of whistleblower rights. For example, OSC's determination to request a stay of an indefinite salary cutoff that would have starved me out of the Marines and the Merit Service Protection Board's willingness to support it, was the turning point in my case during the darkest hours this fall, when I thought it would be necessary to sell my home and give up. I don't think it was a coincidence that the Department of the Navy then issued a favorable security adjudication that now permits me to get back to work.<sup>42</sup>

Moreover, the OSC filed an amicus brief in the case of a prominent whistleblower and former air marshal in his appeal of a MSPB administrative judge's ruling against him, arguing that the MSPB was improperly expanding a narrow exception to the Civil Service Reform Act.<sup>43</sup> Noting these moves, a long-time employment lawyer in Washington, D.C. stated that, "[b]y taking the position that [Lerner] did, and making it clear she was not going to be a wallflower or someone who could just be walked over, . . . she sent a very strong message that whistle-blowers would be protected."<sup>44</sup> According to the *Washington Post*, Lerner has brought a jolt of energy to the Office of Special Counsel because she took on long-neglected cases and, in several high-profile cases, has "gone to the mat and tried to expand the boundaries of the law's protections for whistleblowers."<sup>45</sup>

### c. Administrative Review Board

One final area deserves mention: the Administrative Review Board (ARB) of the Department of Labor. The ARB hears the final

whistleblower-to-return-to-work>.

42. Marcus Baram, *Let's Ensure Whistleblowers' Good Deeds Go Unpunished*, THE HUFFINGTON POST (Nov. 21, 2011, 11:40 AM), <[http://www.huffingtonpost.com/marcus-baram/making-sure-that-whistleb\\_b\\_1105272.html](http://www.huffingtonpost.com/marcus-baram/making-sure-that-whistleb_b_1105272.html)>.

43. Stephen Losey, *Decision to Fire Air Marshal Risks Silencing Whistle-Blowers*, OSC Says, FEDERAL TIMES (last updated Aug. 26, 2011), <<http://www.federaltimes.com/article/20110826/DEPARTMENTS03/108260301/>>.

44. Carrie Johnson, *Government Whistle-Blowers Gain New Advocate*, NPR (Nov. 22, 2011), <<http://www.npr.org/2011/11/22/142599974/government-whistle-blowers-gain-new-advocate>>; see also *id.* ("The agency has switched from being poison ivy for whistle-blowers to being the first option for organizations like ours that are always looking for the best way to defend people who commit the truth.") (quoting Tom Devine).

45. Lisa Rein, *Special Counsel Carolyn Lerner Quickly Raises the Profile of Her Office*, WASH. POST, Dec. 25, 2011, at C1.

administrative appeals of whistleblower claims under twenty-one different federal whistleblower laws.<sup>46</sup> As with his other appointments, Obama dramatically influenced the direction of the ARB. Obama's Secretary of Labor, Hilda Solis, appointed five new members to the ARB's five-member panel in 2010 and 2011, and, as two whistleblower advocates remarked, "[t]ogether they have the most experience, subject matter expertise, and demonstrated commitments to the board's mission of any members in its history."<sup>47</sup> For example, the Board's Chair, Paul Igasaki, formerly chaired the Equal Employment Opportunity Commission during President Bill Clinton's Administration and has worked for numerous non-profit civil rights organizations.<sup>48</sup> The Vice Chair, E. Cooper Brown, previously served on the ARB during Clinton's presidency, and another member, Joanne Royce, worked for GAP, the whistleblower advocacy group mentioned above, for fifteen years.<sup>49</sup>

During a six-month period in 2010 after the appointment of four of these new members, whistleblowers won six out of sixteen cases (37.5 percent) before the ARB on the merits, as opposed to 19.75 percent (eight out of forty-one cases) in 2009.<sup>50</sup> However, more than just statistics indicate the sea change caused by their appointments. The ARB's recent decisions, particularly with regard to the Sarbanes-Oxley Act of 2002, expanded the scope of whistleblower protections and overturned numerous Bush-era decisions adverse to whistleblowers. For example, when President Bush's appointees dominated the Board, the ARB had a narrow view of the scope of protected conduct under Sarbanes-Oxley. Although the Act's terms protected employees who reported any of six different types of misconduct,<sup>51</sup> including violations of broad statutory provisions prohibiting mail and wire fraud, the Bush ARB held that any whistleblower report must *also* "be of a type that would be adverse to investors' interests."<sup>52</sup> If a whis-

46. See *ARB – Areas of Responsibility*, U.S. DEP'T OF LABOR, <<http://www.dol.gov/arb/areas.htm>> (last visited Apr. 16, 2012); *The Whistleblower Protection Program*, U.S. DEP'T OF LABOR, <<http://www.whistleblowers.gov/index.html>> (last visited Apr. 16, 2012).

47. DEVINE & MAASSARANI, *supra* note 1, at 183.

48. *ARB Board Members*, U.S. DEP'T. OF LABOR, <<http://www.dol.gov/arb/members.htm>> (last visited Apr. 16, 2012).

49. *Id.*

50. DEVINE & MAASSARANI, *supra* note 1, at 183.

51. See 18 U.S.C. § 1514A (2006) (prohibiting retaliation against an employee who reports conduct the employee reasonably believes violates laws against mail fraud, wire fraud, banking fraud, securities fraud, "any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders").

52. See *Platone v. FLYi, Inc.*, ARB Case No. 04-154, at 15 (Sept. 20, 2006), *available at*

tleblower reported what she reasonably believed to be securities fraud, then the ARB also required that the whistleblower demonstrate the fraud was material, which in essence required proving *actual* securities fraud, not just that the whistleblower “reasonably believed” securities fraud occurred as required by the statute’s plain language.<sup>53</sup> Moreover, the ARB held that a whistleblower’s protected disclosure must “‘definitively and specifically’ relate to any of the listed categories of fraud or securities violations”<sup>54</sup> – another requirement absent from the statutory language.

In the summer of 2011, the new ARB overturned those holdings in several sweeping opinions. First, the Board found that allegations of mail and wire fraud did *not* also need to relate to shareholders’ interests.<sup>55</sup> Second, the Board rejected its earlier holding regarding “materiality,” by finding that a whistleblower will be protected when disclosing fraudulent conduct, even if a reasonable shareholder would not consider it important in deciding how to vote.<sup>56</sup> Third, the Board criticized the use of the “definitively and specifically” standard as “inappropriate” because it was imported from a case interpreting a different whistleblower statute with language not found in Sarbanes-Oxley.<sup>57</sup>

Other cases reflected the ARB’s willingness to apply the Act’s protections broadly. For example, almost immediately after Congress passed Sarbanes-Oxley in 2002, the issue arose whether privately-held subsidiaries of publicly-traded companies could be held liable under

<[http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB\\_DECISIONS/SOX/04\\_154.SOXP.PDF](http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/04_154.SOXP.PDF)>.

53. *See id.* at 16.

54. *See id.* at 17 (quoting *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000- ERA-31, slip op. at 9 (Sept. 30, 2003), and adopting that case’s interpretation of the whistleblower provision of a different statute, the Energy Reorganization Act (ERA) of 1974, 42 U.S.C. § 5851 (2006)).

55. *See Brown v. Lockheed Martin Corp.*, ARB Case No. 10-050, at 9 (Feb. 28, 2011), available at <[http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB\\_DECISIONS/SOX/10\\_050.SOXP.PDF](http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/10_050.SOXP.PDF)>; see also *Funke v. Federal Express Corp.*, ARB Case No. 09-004, at 8 (July 8, 2011), available at <<http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARBDECISIONS/SOX/09004.SOXP.PDF>>; *Sylvester v. Parexel, Int’l*, ARB Case No. 07-123, at 21 (May 25, 2011), available at <[http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB\\_DECISIONS/SOX/07\\_123.SOXP.PDF](http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/07_123.SOXP.PDF)>. The Board arguably went even further and found that a whistleblower’s protected disclosure did not have to disclose fraudulent conduct at all, as long as it could be seen as “in furtherance of a scheme or artifice to defraud.” *Brown*, ARB Case No. 10-050, at 9.

56. *Sylvester*, ARB Case No. 07-123, at 21. The Board did leave open the possibility that a complaint may concern “such a trivial matter” that there is no protected activity. *See id.* at 22.

57. *Id.* at 18.

Sarbanes-Oxley's antiretaliation provision.<sup>58</sup> The Bush ARB had determined that Sarbanes-Oxley could cover a subsidiary, but only when the subsidiary acted as an agent for a publicly-traded parent specifically to retaliate against the employee – a relatively narrow interpretation.<sup>59</sup> After this decision, administrative law judges (ALJs) and courts still debated the issue until 2010,<sup>60</sup> when Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>61</sup> Dodd-Frank amended Sarbanes-Oxley to make clear that the Act prohibited subsidiaries of publicly-traded companies from retaliating against whistleblowers.<sup>62</sup> Although this legislation resolved the issue going forward, the question remained whether the inclusion of subsidiaries in Sarbanes-Oxley would apply retroactively for cases that arose before Dodd-Frank's enactment. The new Obama ARB determined that Dodd-Frank merely clarified Sarbanes-Oxley's true meaning, and that Sarbanes-Oxley should have always included subsidiaries as covered entities, essentially overturning Bush-era precedent.<sup>63</sup>

The new ARB also interpreted Sarbanes-Oxley broadly to expand the concept of who could receive whistleblower reports. Sarbanes-Oxley's language states that, in order to receive protection, a whistleblower must report misconduct to “(A) a Federal regulatory or law enforcement agency; (B) any Member or committee of Congress; or (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).”<sup>64</sup> In July 2011, the

58. See Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 110-13, 134-37 (2007).

59. See *Klopfenstein v. PCC Flow Tech. Holdings, Inc.*, ARB No. 04-149, at 15 (May 31, 2006), available at <[http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB\\_DECISIONS/SOX/04\\_149.SOXP.PDF](http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/04_149.SOXP.PDF)>. This restriction arguably contravened the purpose of the statute and resulted in numerous dismissals of whistleblower cases by Department of Labor Administrative Law Judges. See Moberly, *supra* note 58, at 134-37.

60. See *Johnson v. Siemens Bldg. Techs., Inc.*, ARB No. 08-032, at 10-11 (Mar. 31, 2011), available at <[http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB\\_DECISIONS/SOX/08\\_032A.SOXP.PDF](http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/08_032A.SOXP.PDF)> (citing cases with different holdings regarding this issue).

61. Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter Dodd-Frank Act] (codified at scattered sections of the U.S. Code).

62. Section 929A of the Dodd-Frank Act amended Sarbanes-Oxley section 806(a) to add the following italicized language regarding the entities that may not retaliate against a whistleblower: “No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)), . . . including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, [may retaliate].” Pub. L. No. 111-203, § 929A, 124 Stat. at 1852 (codified at 18 U.S.C. § 1514A(a) (Supp. IV 2010)).

63. See *Johnson*, ARB No. 08-032, at 16.

64. 18 U.S.C. § 1514A(a)(1).

ARB interpreted this language to include a report to local or state law enforcement, despite the ambiguity in the statutory language regarding whether “Federal” in subsection A modifies “law enforcement agency” as well as “regulatory.”<sup>65</sup> Only protecting reports to federal law enforcement would, according to Obama’s ARB, result in a “hypertechnical distinction” that would be inconsistent with the goal of the statute to promote disclosures.<sup>66</sup> In September 2011, the ARB also determined that Sarbanes-Oxley protected whistleblowers who reported to the IRS as part of its whistleblower bounty program, because the IRS is a “Federal regulatory . . . agency.”<sup>67</sup>

Obama’s ARB expanded upon what would be considered an “adverse action” under Sarbanes-Oxley. In *Menendez v. Halliburton*,<sup>68</sup> an employee had reported violations of accounting standards to the company and the SEC.<sup>69</sup> Although this whistleblowing qualified as protected activity, the ALJ held that the employee did not suffer any retaliatory adverse action.<sup>70</sup> The new ARB, however, reversed this decision and detailed an easy standard for plaintiffs to meet in order to satisfy the “adverse action” element of a Sarbanes-Oxley claim.<sup>71</sup> The ARB stated that “minor acts of retaliation can be sufficiently substantial when viewed together,” and therefore held that a whistleblower could recover if retaliation was “more than trivial,”<sup>72</sup> a standard that likely would cover a broader range of retaliatory actions than the Supreme Court previously found actionable for Title VII claims in *Burlington Northern & Santa Fe Railway Co. v. White*.<sup>73</sup> The ARB in *Menendez* used this new standard to find an adverse action when a company merely released the name of the whistleblower to its employees as part of its internal investigation into the employee’s com-

65. See *Funke v. Federal Express Corp.*, ARB Case No. 09-004, at 16 (July 8, 2011), available at <[http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB\\_DECISIONS/SOX/09\\_004.SOXP.PDF](http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/09_004.SOXP.PDF)>.

66. *Id.*

67. See *Vannoy v. Celanese Corp.*, ARB No. 09-118, at 12 (Sept. 28, 2011), available at <[http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB\\_DECISIONS/SOX/09\\_118.SOXP.PDF](http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/09_118.SOXP.PDF)>.

68. ARB Nos. 09-002 & 09-003 (Sept. 13, 2011), available at <[http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB\\_DECISIONS/SOX/09\\_002.SOXP.PDF](http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/09_002.SOXP.PDF)>.

69. See *id.* at 2-4.

70. See *id.* at 9, 11.

71. See *id.* at 21.

72. *Id.*

73. 548 U.S. 53 (2006). The ARB distinguished *Burlington Northern* and found that the case was helpful in determining the scope of prohibited actions, but was not dispositive because Sarbanes-Oxley clearly prohibits “a very broad spectrum” of retaliatory activity, including nontangible adverse actions. See *Menendez*, ARB Nos. 09-002 & 09-003, at 15-16.

plaint.<sup>74</sup>

In addition to broadening Sarbanes-Oxley's reach, the new ARB restricted employer defenses. In one remarkable case, Obama's ARB even seemed to undermine an employer's ability to fire an employee for revealing confidential information and taking confidential documents, if the employee uses that information and those documents as part of the whistleblowing process. In *Vannoy v. Celanese Corp.*,<sup>75</sup> a whistleblower took confidential employer documents, including information related to personal information of current and former employees, to help substantiate his claims of wrongdoing.<sup>76</sup> The ALJ agreed with the employer's argument that it fired the employee because he violated his confidentiality agreement with the company, and therefore the employee did not demonstrate that the employee's whistleblowing was a contributing factor in his dismissal and that, even if the firing and the whistleblowing were connected, the employer proved by clear and convincing evidence that it would have fired the employee anyway because of the breach of confidentiality.<sup>77</sup> However, the ARB determined that the ALJ did not give sufficient weight to the employee's need for internal documents in order to provide original information to government regulators, and the ARB remanded the case for a further evidentiary hearing, noting that, "[t]here is a clear tension between a company's legitimate business policies protecting confidential information and the whistleblower bounty programs created by Congress to encourage whistleblowers to disclose confidential company information in furtherance of enforcement of tax and securities laws."<sup>78</sup>

The ARB's new approach also can be seen in the way in which it is deciding cases. In the first few years of Sarbanes-Oxley cases, ALJs tended to dismiss cases based on summary adjudications, finding that whistleblowers failed to prove their cases as a matter of law.<sup>79</sup> In the few cases in which ALJs held hearings, whistleblowers fared much better, supporting the notion that whistleblower cases often present

74. *Menendez*, ARB Nos. 09-002 & 09-003, at 22-26. The ARB supported this conclusion by noting that this breach of confidentiality violated Sarbanes-Oxley Section 301's requirement that companies provide a confidential, anonymous reporting channel for whistleblowers to report misconduct. *See id.*

75. ARB No. 09-118 (Sept. 28, 2011), available at <[http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB\\_DECISIONS/SOX/09\\_118.SOXP.PDF](http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/09_118.SOXP.PDF)>.

76. *Id.* at 5.

77. *Id.* at 7-8.

78. *Id.* at 15-17.

79. *See Moberly*, *supra* note 58, at 104-05.



fact-intensive issues that need evidentiary hearings to explore.<sup>80</sup> The new ARB seems to be sending a message to ALJs that they should prefer evidentiary hearings over summary dispositions. In *Sylvester v. Parexel International, Inc.*,<sup>81</sup> the ARB stated that “Rule 12 motions challenging the sufficiency of the pleadings are highly disfavored by the SOX regulations and highly impractical under the Office of Administrative Law Judge (OALJ) rules,”<sup>82</sup> in part because they involve “inherently factual issues such as ‘reasonable belief’ and issues of ‘motive.’”<sup>83</sup> Also, in *Vannoy v. Celanese Corp.*,<sup>84</sup> the ARB reversed a summary disposition in favor of the employer and ordered the ALJ to conduct a detailed and specific evidentiary hearing.<sup>85</sup> It may be too early to tell whether these cases constitute a trend toward demanding that ALJs issue fewer summary judgments, but the ARB cases from 2011 seem, at a minimum, to indicate that the ARB understands the negative impact summary dispositions can have on whistleblowers.

## 2. Legislation

President Obama also demonstrated his belief in the importance of whistleblowing by supporting the addition of whistleblower protections in his most significant legislative achievements: the economic stimulus package, health care reform, and the reform of the financial industry.

### a. Stimulus Bill

Immediately after taking office, President Obama signed the American Recovery and Reinvestment Act of 2009,<sup>86</sup> also called the “Stimulus Bill,” to respond to the recession and to create jobs. The Act protects a broad range of disclosures by employees of non-Federal employers that receive stimulus funds.<sup>87</sup> On paper, the Act’s

80. *See id.* at 127-28.

81. ARB No. 07-123 (May 25, 2011), available at <[http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB\\_DECISIONS/SOX/07\\_123.SOXP.PDF](http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/07_123.SOXP.PDF)>.

82. *Id.* at 13.

83. *Id.*

84. ARB No. 09-118, at 12 (Sept. 28, 2011), available at <[http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB\\_DECISIONS/SOX/09\\_118.SOXP.PDF](http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/SOX/09_118.SOXP.PDF)>.

85. *Id.* at 14-17.

86. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553, 123 Stat. 115, 297 (codified in scattered sections of the U.S. Code).

87. *See id.* § 1553(a)(1)-(5), 123 Stat. 297 (protecting disclosures related to use of the stimulus funds, including a gross waste of the funds, gross mismanagement of them, or a violation of law related to use of the funds).

antiretaliation provision follows the “best practices” that began with Sarbanes-Oxley in 2002 and have developed in the last decade, including a burden of proof that seems favorable to whistleblowers.<sup>88</sup> Moreover, whistleblowers can report violations to a wide range of institutions and individuals, including both internal and external recipients.<sup>89</sup> The Act provides for an administrative remedy first, but, like Sarbanes-Oxley, permits whistleblowers to file claims in federal district court if the administrative process is not completed in a timely manner.<sup>90</sup>

Importantly, the Act’s whistleblower provision also implements new innovations that would be repeated by other Obama whistleblower protections. It prohibits the use of pre-dispute arbitration provisions to force a whistleblower to arbitrate claims brought under the Act.<sup>91</sup> Additionally, the Act expressly permits whistleblowers to use circumstantial evidence to demonstrate that their protected activity played a “contributing factor” in the employer’s retaliation, specifically including “evidence that the official undertaking the reprisal knew of the disclosure” or “evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal.”<sup>92</sup>

88. An employee must demonstrate that a protected disclosure was a “contributing factor” in an employer deciding to take an adverse employment action against the employee. *See id.* § 1553 (c)(1)(A)(i), 123 Stat. 299. If the employee succeeds, the employer will be held liable for damages resulting from the retaliation unless the employee can demonstrate by clear and convincing evidence that it would have taken the same action regardless of the protected activity. *See id.* § 1553(c)(1)(B), 123 Stat. 299.

89. *See id.* § 1553(a), 123 Stat. 297 (protecting disclosures made to “the [Recovery Accountability and Transparency] Board, an inspector general, the Comptroller General, a member of Congress, a State or Federal regulatory or law enforcement agency, a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct), a court or grand jury, the head of a Federal agency or their representatives”).

90. *See id.* § 1553(c)(3), 123 Stat. 300 (permitting a whistleblower to file a claim for a jury trial in federal court if the inspector general of the federal agency has not issued an order within 210 days after the submission of a complaint or has denied the whistleblower’s claim). The whistleblower must first report retaliation to an appropriate inspector general, who must then investigate and submit a report to the whistleblower and the employer within 180 days. *See id.* § 1553(b), 123 Stat. 297-98.

91. *See id.* § 1553(d), 123 Stat. 301. The Dodd-Frank Wall Street Reform and Consumer Protection Act and the Patient Protection and Affordable Care Act of 2009 both have similar provisions. *See* The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1558(b)(2), 124 Stat. 119, 261 (2010) (“The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.”); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 748, 124 Stat. 1376, 1739 (2010); *id.* § 1057, 124 Stat. at 2031.

92. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(c)(1)

## b. Health Care Reform

Second, on March 23, 2010, Obama signed the Patient Protection and Affordable Care Act (PPACA),<sup>93</sup> commonly known as health care reform. The PPACA protects employees from retaliation if they report violations of the Act.<sup>94</sup> Although not as detailed as the Stimulus Bill's provision, the PPACA's whistleblower protections still provide the strong whistleblower protections found in other recent federal statutes, including permitting employees to make reports of misconduct internally or externally, and protecting employees who refuse to violate the Act.<sup>95</sup> The PPACA also adopts the employee-friendly burden of proof and procedures set out in recent whistleblower provisions such as Sarbanes-Oxley and the Consumer Product Safety Improvement Act.<sup>96</sup> In other words, the whistleblower must file an initial administrative claim with the Occupational Health and Safety Administration in the Department of Labor, which will determine whether the whistleblower's protected activity was a "contributing factor" in an adverse employment action.<sup>97</sup> If so, the whistleblower will prevail, unless the employer proves by clear and convincing evidence that it would have taken the same action regardless of the protected activity.<sup>98</sup> Moreover, if the Department of Labor does not finish its administrative review within 210 days, the whistleblower may file a *de novo* claim for a jury trial in federal district court.<sup>99</sup>

## c. Wall Street Reform

Third, Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act on July 21, 2010.<sup>100</sup> While his other major legislative achievements included antiretaliation provisions that mir-

(A)(ii)(I) & (II), 123 Stat. 115, 299.

93. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

94. *Id.* § 1558(a), 124 Stat. 261.

95. *See id.*

96. *See id.* § 1558(b), 124 Stat. 261 (adopting procedures of Consumer Product Safety Improvement Act, 15 U.S.C. § 2087(b) (Supp. IV 2010)); *cf.* 49 U.S.C. § 42121(b) (2006) (whistleblower procedures adopted by Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A(b) (2006)).

97. *See* 15 U.S.C. § 2087(b); 49 U.S.C. § 42121(b).

98. *See id.*

99. *See* 15 U.S.C. § 2087(b)(4) (adopted by The Patient Protection and Affordable Care Act, § 1558(b), 124 Stat. 261); *cf. id.* § 1514A(b)(1)(B) (permitting federal court claim after 180 days without a final resolution by the Department of Labor); 18 U.S.C. § 1514A(b)(2)(E) (permitting jury trial).

100. Pub. L. No. 111-203, 124 Stat. 1376 (2010).

rored other statutes, Dodd-Frank truly revolutionized whistleblower law in the United States. Most importantly, the Act permits whistleblowers to file for rewards of 10 percent to 30 percent of any enforcement penalties recovered by the Securities and Exchange Commission and the Commodity Futures Trading Commission.<sup>101</sup> These provisions attempt to adopt the False Claims Act's "bounty" model, which has been utilized successfully for decades to reward whistleblowers who reported fraud on the government.<sup>102</sup> Dodd-Frank extends this concept to reports of securities and commodities fraud on the general public.<sup>103</sup>

Within a year after Dodd-Frank's passage, the Securities and Exchanges Commission (SEC) released rules and regulations implementing the Act's "bounty" program.<sup>104</sup> The three Democrats on the SEC, including Chairman Mary Schapiro, the one Commissioner able to be appointed by President Obama at the time, approved the controversial regulations over dissenting votes by the two Republicans appointed by President George W. Bush.<sup>105</sup> Despite heavy lobbying and pressure from business interests,<sup>106</sup> the SEC refused to require whistleblowers to report internally through a company's grievance

101. *Id.* § 922(a), 124 Stat. 1841 (2010) (codified at 15 U.S.C. § 78u-6(b) (Supp. IV 2010)) (SEC); *Id.* § 748, 124 Stat. 1739 (2010) (codified at 7 U.S.C. § 26) (CFTC).

102. See Elletta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273, 278-82 (1992). Unlike the False Claims Act, however, Dodd-Frank does not permit the whistleblower to litigate claims on behalf of the government.

103. Pub. L. No. 111-203 § 922(a), 124 Stat. 1841 (codified at 15 U.S.C. § 78u-6(a)(6)) (defining "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws").

104. See Securities Exchange Act, Release No. 34-64545, File No. S7-33-10 (May 25, 2011) (to be codified at 17 CFR pts. 240 and 249). The Commodity Futures Trading Commission issued substantially similar regulations. See Final Rules for Implementing the Whistleblower Provisions of Section 23 of the Commodities Futures Act, 76 F.R. 53172 (Aug. 25, 2011). In this article, I will focus on the SEC provisions.

105. The five-year terms of the Commissioners are staggered so that one term ends on June 5 each year, and no more than three Commissioners may belong to the same political party. See *Current SEC Commissioners*, U.S. SEC. & EXCH. COMM'N, <<http://sec.gov/about/commissioner.shtml>> (last visited Apr. 17, 2012). President Obama inherited a Commission with two Democrats, Ellise Walter and Luis Aguilar, and he appointed another Democrat, Chairman Mary Schapiro. *SEC Historical Summary of Chairmen and Commissioners*, U.S. SEC. & EXCH. COMM'N, <<http://sec.gov/about/sechistoricalsummary.htm>> (last visited Apr. 17, 2012) (providing information about presidential appointments and political affiliation of commissioners). All three Democrats voted for the rules, while Commissioners Paredes and Casey, both Republicans appointed by President Bush, dissented. See *id.*; *Resources, Office of the Whistleblower*, U.S. SEC. & EXCH. COMM'N, <<http://www.sec.gov/about/offices/owb/owb-resources.shtml#remarks>> (last visited Apr. 17, 2012) (providing the Commissioners' remarks on the rules).

106. The SEC received 240 comment letters and approximately 1,300 form letters regarding the proposed rules. See Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,300 (June 13, 2011).

procedure before reporting to the SEC (although the regulations do include incentives for internal reporting).<sup>107</sup> Moreover, the SEC changed its proposed definition of whistleblower from one who reports “potential” violations to one who reports a “possible” violation that may be “about to occur,” and the whistleblower must simply have a “reasonable belief” that the violation might occur.<sup>108</sup> The new rules also provided some retaliation protection for auditors, lawyers, and other compliance personnel who report misconduct – a stark difference from the proposed rules that mostly denied protection to these whistleblowers.<sup>109</sup> Many perceived the SEC’s rejection of industry demands as a positive sign that the SEC would begin to take whistleblowers seriously,<sup>110</sup> although this remains to be seen because the first awards will not be issued until sometime in 2012. However, within seven weeks of the beginning of the SEC’s Dodd-Frank program, the SEC received 334 whistleblower tips,<sup>111</sup> the quality of which, according to a former SEC lawyer, has been “remarkably high.”<sup>112</sup>

Additionally, Dodd-Frank included another strong antiretaliation provision that permits whistleblowers to bring claims for retaliation directly in federal district court.<sup>113</sup> In fact, the Act appears to provide corporate whistleblowers an interesting alternative to Sarbanes-Oxley: because Dodd-Frank’s protected conduct includes making a

107. *See id.* at 34,324-27.

108. *See id.* at 34,302-04.

109. *See id.* at 34,314-17.

110. *See* Thad Guyer, *Final Dodd-Frank Whistleblower Rules: Are You Prepared?*, GOV’T ACCOUNTABILITY PROJECT (June 15, 2011), <<http://www.whistleblower.org/storage/documents/Guyer.pdf>> (noting that SEC often chose whistleblower-friendly rules when faced with two choices); Richard Renner, *SEC’s Dodd-Frank Rules Are a Major Victory for Whistleblowers*, WHISTLEBLOWERS PROT. BLOG (May 25, 2011), <<http://www.whistleblowersblog.org/2011/05/articles/whistleblowers-tax-fraud/secs-doddfrank-rules-are-a-major-victory-for-whistleblowers/>> (“The outcome [of the new rules] is a major victory for whistleblowers.”); Press Release, Gov’t Accountability Project, SEC Issues Win-Win Whistleblower Rules (May 26, 2011), *available at* <<http://www.whistleblower.org/press/press-release-archive/1134-sec-issues-win-win-whistleblower-rules>> (“Yesterday the SEC took the high road to strengthen the role of whistleblowers against corporate fraud. It rejected demands by a big business ‘fraud lobby’ and House Republicans to twist whistleblowing into obstruction of justice.”).

111. *See* U.S. SEC. & EXCH. COMM’N, ANNUAL REPORT ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, FISCAL YEAR 2011, at 5 (2011), *available at* <<http://sec.gov/about/offices/owb/whistleblower-annual-report-2011.pdf>>. The report covers claims from Aug. 12, 2011, the date the regulations became effective, until Sept. 30, 2011, the end of the fiscal year. *See id.*

112. *See* Samuel Rubinfeld, *SEC Receives 334 Tips in First Seven Weeks of Whistleblower Program*, WALL ST. J. (Nov. 16, 2011, 3:21 PM), <<http://blogs.wsj.com/corruption-currents/2011/11/16/sec-receives-334-tips-in-first-seven-weeks-of-whistleblower-program/>>.

113. *See* Dodd-Frank Act, Pub. L. No. 111-203, § 922(a), 124 Stat. 1376, 1841 (2010) (codified at 15 U.S.C. § 78u-6(h)(1)(B)(i) (Supp. IV 2010)).

disclosure protected by Sarbanes-Oxley,<sup>114</sup> whistleblowers who make disclosures protected by both statutes may opt to bring a Dodd-Frank claim because the statute of limitations is significantly longer (three years versus 180 days for Sarbanes-Oxley) and the Act permits two times the amount of back pay owed to the whistleblower, a bonus that Sarbanes-Oxley does not offer.<sup>115</sup> Furthermore, Dodd-Frank fixed some of the flaws that had become apparent in Sarbanes-Oxley's antiretaliation provision,<sup>116</sup> such as extending Sarbanes-Oxley's statute of limitations from ninety to 180 days, adding an explicit right to a jury trial if a whistleblower brings a claim in federal court, and clarifying that Sarbanes-Oxley protects employees of privately-held subsidiaries of publicly-traded companies.<sup>117</sup> It also provides new whistleblower protection for employees in the financial services industry who report fraud or illegal conduct related to the provision of a consumer financial product or service.<sup>118</sup>

#### d. Other Legislation

Other legislation passed during Obama's presidency contained whistleblower protections. The Fraud Enforcement and Recovery Act of 2009 (FERA)<sup>119</sup> closed loopholes in the False Claims Act to better encourage whistleblowers to report fraud on the government.<sup>120</sup> For example, FERA extended antiretaliation protection to contractors, sub-contractors, and agents who report fraud in addition to "employees" that the FCA already covered.<sup>121</sup> Also, the Coast Guard

114. See *id.* (codified at 15 U.S.C. § 78u-6(h)(1)(A)(iii)).

115. Compare *id.* (codified at 15 U.S.C. § 78u-6(h)(1)(B)(iii)(I)(bb)) (three year statute of limitations) and *id.* § 922(a) (codified at 15 U.S.C. § 78u-6(h)(1)(C)(ii)) (double back pay damages) with 18 U.S.C. § 1514A(b)(2)(D) (2006) (180 day statute of limitations) and *id.* § 1514A(c) (permitting damage claim for back pay, but not two times back pay).

116. See generally Moberly, *supra* note 58, at 132-37 (pointing out flaws in Sarbanes-Oxley's antiretaliation provision).

117. See Dodd-Frank Act, § 922(c), 124 Stat. 1848 (codified at 18 U.S.C. § 1514A(b)(2)(D)) (180 days); *id.* (codified at 18 U.S.C. § 1514A(b)(2)(E)) (jury trial); *id.*, § 929A, 124 Stat. 1852 (codified at 18 U.S.C. § 1514A) (adding language regarding subsidiaries).

118. See *id.* § 1057, 124 Stat. 2031 (codified at 12 U.S.C. § 5567).

119. Pub. L. No. 111-21, 123 Stat. 1617 (2009) [hereinafter FERA].

120. The Senate Report accompanying the legislation noted that the changes were necessary because "[t]he effectiveness of the False Claims Act has recently been undermined by court decisions which limit the scope of the law and, in some cases, allow subcontractors paid with Government money to escape responsibility for proven frauds." S. REP. NO. 111-10, at 4 (2009). The Report also detailed the ways in which the FERA amended the FCA "to clarify and correct erroneous interpretations of the law" by the Supreme Court. *Id.* at 10.

121. FERA, § 4(d), 123 Stat. 1624 (codified at 31 U.S.C. § 3730(h)(1) (Supp. IV 2010)).

Authorization Act of 2010<sup>122</sup> amended the Seaman's Protection Act<sup>123</sup> to greatly expand the types of conduct in which a seaman can engage to be protected from retaliation<sup>124</sup> and to provide the same type of "best practices" burdens of proof, administrative remedies, and *de novo* review in federal district court as Sarbanes-Oxley and the other recent antiretaliation statutes discussed above.<sup>125</sup> Most recently, the FDA Food Safety Modernization Act,<sup>126</sup> which President Obama signed on January 4, 2011, provided new whistleblower protections for employees who disclose violations of the Federal Food, Drug, and Cosmetic Act.<sup>127</sup> Once again, the Act utilized the same best practices from recent antiretaliation provisions.<sup>128</sup>

In many ways, then, President Obama fulfilled Candidate Obama's promises related to whistleblowing. His appointees arguably revolutionized whistleblower protection for both public and private employees. His legislative accomplishments included strong whistleblower protections. In short, whistleblower advocates have much to cheer after three years of an Obama Presidency. Yet, despite this strong support for whistleblowers generally, Obama seems to believe that one type of whistleblower should receive less robust protection: a whistleblower who makes disclosures related to national security, especially if one discloses classified information publicly, such as to the media.

### *B. National Security: The Great Exception*

The "national security whistleblower," as I use the term here, either works for an agency in the "intelligence community,"<sup>129</sup> like the

122. Pub. L. No. 111-281, § 611, 124 Stat. 2905, 2969 (2010).

123. 46 U.S.C. § 2114 (Supp. IV 2010).

124. Coast Guard Authorization Act § 611(a)(3), 124 Stat. 2969 (codified at 46 U.S.C. § 2114(a)(1)(C)-(G) (Supp. IV 2010)).

125. The Act deleted the previous provision allowing for a claim to be filed directly in federal court and adopted the "procedures, requirements, and rights" of the Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105(b) (Supp. IV 2010). See H.R. REP. NO. 111-303 § 2114 (2009) (showing deletions to old provision); Coast Guard Authorization Act § 611(a)(4), 124 Stat. 2969 (amending 46 U.S.C. § 2114(b) to reference 49 U.S.C. § 31105(b)). The STAA procedures, requirements, and rights mirror Sarbanes-Oxley's provisions. Compare 49 U.S.C. § 31105(b) with 18 U.S.C. § 1514A(b) (2006).

126. Pub. L. No. 111-353, 124 Stat. 3885 (2011).

127. See *id.* § 402, 124 Stat. 3968 (to be codified as 21 U.S.C. § 1012(a)).

128. Compare *id.* with 18 U.S.C. § 1514A(b) (2006).

129. The National Security Act of 1947, as amended, defines the "intelligence community" to include a wide variety of agencies:

(A) The Office of the Director of National Intelligence.

(B) The Central Intelligence Agency.

National Security Agency, or reveals classified information (or both). As discussed below, in some cases the Obama Administration reacted with outright hostility to such whistleblowers, making a distinction between “bad” whistleblowing, which Obama calls “leaking” when it relates to national security, and “good” whistleblowing, which relates to non-security issues. In other instances, the Obama Administration reacted with more nuance by acknowledging the need for some protection for national security whistleblowers, but rejecting calls for the full panoply of rights the law typically provides other types of government whistleblowers.

### 1. Statements from Obama’s Administration

The way the Obama Administration framed the issue through public statements demonstrates this more nuanced approach. For example, in March 2009, less than two months into his presidency, Obama gave some indication that he would make finer distinctions about whistleblowing than his statements as a candidate might indicate. He released a signing statement with a spending bill that provided protection to federal officials who reported information to Congress in which he stated that the bill should not be interpreted to undermine his authority to control communications with Congress “in cases where such communications would be unlawful or would reveal information that is properly privileged or otherwise confidential.”<sup>130</sup>

(C) The National Security Agency.

(D) The Defense Intelligence Agency.

(E) The National Geospatial-Intelligence Agency.

(F) The National Reconnaissance Office.

(G) Other offices within the Department of Defense for the collection of specialized national intelligence through reconnaissance programs.

(H) The intelligence elements of the Army, the Navy, the Air Force, the Marine Corps, the Coast Guard, the Federal Bureau of Investigation, the Drug Enforcement Administration, and the Department of Energy.

(I) The Bureau of Intelligence and Research of the Department of State.

(J) The Office of Intelligence and Analysis of the Department of the Treasury.

(K) The elements of the Department of Homeland Security concerned with the analysis of intelligence information.

(L) Such other elements of any department or agency as may be designated by the President, or designated jointly by the Director of National Intelligence and the head of the department or agency concerned, as an element of the intelligence community.

50 U.S.C. § 401a(4) (2006).

130. Statement by the President (Mar. 11, 2009), *available at* <[http://www.whitehouse.gov/the\\_press\\_office/Statement-from-the-President-on-the-signing-of-HR-1105](http://www.whitehouse.gov/the_press_office/Statement-from-the-President-on-the-signing-of-HR-1105)>. The law prohibits the use of appropriations to pay salaries of anyone who “interferes with or prohibits” communications between federal employees and Congress related to the employee’s job or agency. Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, § 714(1), (2), 123 Stat. 524, 684.



As the Brennan Center for Justice, a non-partisan public policy and law institute affiliated with New York University School of Law, noted,

by objecting to a provision that was designed to prohibit retaliation against employees who reveal executive misconduct, President Obama's statement intentionally or unintentionally sends a message to employees: If you report misconduct to Congress against the will of the head of your agency, and if the agency considers that information "confidential," you may face retaliation. This could have a chilling effect on potential whistleblowers and hinder the public's ability to learn about government wrongdoing.<sup>131</sup>

Shortly thereafter, in November 2009, Robert S. Litt, who President Obama appointed as General Counsel for the Office of the Director of National Intelligence, promised action against "leaks of classified information that have caused specific and identifiable losses of intelligence capabilities."<sup>132</sup> More recently, in May 2011, Obama's appointment to head the Justice Department's national security division, Lisa Monaco, testified to Congress that "it would be my priority to continue the aggressive pursuit of [leak] investigations" because leaks do "tremendous damage."<sup>133</sup> Monaco noted that "twice as many" leak cases had been pursued during Obama's presidency than in all previous Administrations.<sup>134</sup> Similarly, after the raid that killed Osama bin Laden that same month, Leon Panetta, then the Director of the CIA, sent a memo to CIA employees stating, "Disclosure of classified information to anyone not cleared for it – reporters, friends, colleagues in the private sector or other agencies, former Agency officers – does tremendous damage to our work. At worst, leaks endanger lives."<sup>135</sup>

The media has corroborated that this anti-leak mentality begins at the top, asserting that Obama "is deeply troubled by leaks on sensitive national security matters like Afghanistan and Pakistan."<sup>136</sup> In his book, *The Promise*, Newsweek's Jonathan Alter wrote that "Obama

131. See BRENNAN CTR. FOR JUSTICE AT N.Y. UNIV. SCH. OF LAW, TRANSPARENCY IN THE FIRST 100 DAYS: A REPORT CARD 23 (2009), available at <[http://brennan.3cdn.net/07b3343e216944f6d9\\_ggm6ib3yb.pdf](http://brennan.3cdn.net/07b3343e216944f6d9_ggm6ib3yb.pdf)>.

132. Scott Shane, *Obama Steps up Prosecution of Leaks to the News Media*, N.Y. TIMES, June 12, 2010, at A1.

133. Shane, *supra* note 9.

134. *Id.*

135. Leon Panetta Warns CIA Employees: No More OBL Raid Leaks, ABC NEWS (May 19, 2011, 6:14 PM), <<http://abcnews.go.com/blogs/politics/2011/05/leon-panetta-warns-cia-employees-no-more-obl-raid-leaks/>>.

136. Gerstein, *supra* note 8.

had one pet peeve that could make him lose his cool . . . leaks.”<sup>137</sup> Jane Mayer from *The New Yorker* related a conversation from a meeting between Obama and a group of advocates for more transparency in government, in which Obama “drew a sharp distinction between whistle-blowers who exclusively reveal wrongdoing and those who jeopardize national security.”<sup>138</sup> Ms. Mayer described a statement of Danielle Brian from the Project on Government Oversight who attended the meeting, saying:

Obama’s tone was generally supportive of transparency. But when the subject of national-security leaks came up, Brian said, “the President shifted in his seat and leaned forward. He said this may be where we have some differences. He said he doesn’t want to protect the people who leak to the media war plans that could impact the troops.”<sup>139</sup>

Unfortunately, as described in more detail below,<sup>140</sup> the line between whistleblowing and leaking may not be as clear as Obama asserted during that meeting. Nevertheless, the statement provides some context for evaluating President Obama’s actions, which even more than his Administration’s statements, demonstrate his approach to national security whistleblowers.

## 2. Actions by Obama’s Administration

At the same time that it supported whistleblowers in the non-security context, Obama’s Administration criminally prosecuted those who publicly disclosed conduct related to national security, conveyed a conspicuous lack of support for legislation that would improve protection for national security whistleblowers, and attempted to force reporters to reveal confidential sources for stories disclosing national security issues.

### a. Criminal Prosecutions of Whistleblowers

Most alarmingly for whistleblower advocates, the Obama Administration used the Espionage Act, a statute typically reserved for the treasonous act of giving secret information to an enemy, to prosecute six individuals who could be described as whistleblowers because

137. JONATHAN ALTER, *THE PROMISE* 154 (2010). Alter reported that Obama is “fear-some” about leaks, although the leaks described in *The Promise* seem to relate to policy disputes that Obama believed were better handled internally rather than in the newspapers. *See id.* at 155.

138. *See* Mayer, *supra* note 7, at 48.

139. *See id.*

140. *See* discussion *infra* Part IV.A.

they gave information about misconduct to the media.<sup>141</sup> For example, the Obama (and Bush) Administrations criminally pursued Thomas Drake, a former employee of the National Security Agency (NSA), for allegedly disclosing classified information to a reporter.<sup>142</sup> Although Drake admitted telling a reporter that the NSA mismanaged certain projects and wasted almost \$1 billion on a flawed surveillance system, he denied revealing any classified information.<sup>143</sup> Initially, prosecutors charged Drake with Espionage Act violations carrying a possible penalty of up to thirty-five years in jail.<sup>144</sup> However, the DOJ ultimately dropped almost all of the charges. After five years of investigation, Drake pled guilty to a misdemeanor charge of “exceeding authorized use of a computer” and did not receive any fine or jail time.<sup>145</sup>

The prosecution struck many observers as heavy-handed,<sup>146</sup> particularly when the Department of Defense Inspector General released a report substantiating Drake’s claims about mismanagement and waste of public funds.<sup>147</sup> Moreover, the evidence that Drake possessed classified information was thin. Indeed, J. William Leonard, an official who was in charge of classifying information during the George W. Bush Administration, recently filed a complaint against the NSA for improperly classifying the document that formed the core of the government’s case against Drake, stating that he had “never seen a more deliberate and willful example of government officials improperly classifying a document.”<sup>148</sup> Remarkably, the judge

141. Savage, *supra* note 9; Shane, *supra* note 9. These prosecutions total more than the three previous cases brought by all previous Administrations combined. *See id.*

142. Mayer, *supra* note 7, at 47.

143. *See id.* at 55.

144. *Id.*; Glen Greenwald, *Obama's Whistleblower War Suffers Two Defeats*, SALON (July 30, 2011), <[http://www.salon.com/news/departments\\_of\\_justice/index.html?story=/opinion/greenwald/2011/07/30/whistleblowers](http://www.salon.com/news/departments_of_justice/index.html?story=/opinion/greenwald/2011/07/30/whistleblowers)>.

145. Ellen Nakashima, *Judge Blasts Prosecution of Alleged NSA Leaker*, WASH. POST, July 29, 2011, at A2.

146. *See generally* Mayer, *supra* note 7, at 48, 57 (describing reactions to prosecution). Even Gabriel Schoenfeld, a noted conservative author who has argued for stronger protection of classified information, called the prosecution “draconian.” *See id.* at 47.

147. *See* Kathleen McClellan, *Inspector General Report Vindicates GAP Clients From National Security Agency*, GOV’T ACCOUNTABILITY PROJECT (June 23, 2011), <<http://www.whistleblower.org/blog/31/1207>>; *see also* OFFICE OF THE INSPECTOR GEN. OF THE DEP’T OF DEF., REPORT 05-INTEL-03, REQUIREMENTS FOR THE TRAILBLAZER AND THINTHREAD-SYSTEMS ii (2004), available at <[www.whistleblower.org/storage/documents/IGR.pdf](http://www.whistleblower.org/storage/documents/IGR.pdf)> (“[T]he NSA transformation effort may be developing a less capable long-term digital network exploitation solution that will take longer and cost significantly more to develop.”).

148. *See* Scott Shane, *Complaint Seeks Punishment for Classification of Documents*, N.Y. TIMES, Aug. 2, 2011, at A16.

even excoriated the prosecutors for their handling of the case, saying that the prosecution was “unconscionable” and did not “pass the smell test.”<sup>149</sup>

Another example involves WikiLeaks, the website begun in 2007 to provide an anonymous place that whistleblowers from all over the world could post documents revealing government or corporate misconduct.<sup>150</sup> In 2010 and 2011, hundreds of thousands of classified U.S. government documents were provided to WikiLeaks, which posted them online and caused a diplomatic furor because they revealed embarrassing, and sometimes illegal, government conduct.<sup>151</sup> The Obama Administration reacted strongly: it added the organization to its list of enemies that threatened the security of the United States,<sup>152</sup> claimed that the release of documents put American troops in danger,<sup>153</sup> and ultimately arrested Army Private Bradley Manning for leaking many of the documents to the website.<sup>154</sup> Human rights activists criticized the Obama Administration for its treatment of Manning, who for the first year of his arrest reportedly was held in strict solitary confinement and made to sleep with a “suicide-proof smock” rather than his normal clothes.<sup>155</sup> The government also conducted a criminal grand jury investigation of WikiLeaks and its founder, Julian Assange,<sup>156</sup> that at least one source, the Australian embassy in Washington, D.C.,

149. Nakashima, *supra* note 145.

150. *What is Wikileaks*, WIKILEAKS.ORG, <<http://wikileaks.org/About.html>> (last visited Apr. 17, 2012).

151. See, e.g., Scott Shane, *Keeping Secrets WikiSafe*, N.Y. TIMES, Dec. 11, 2010, at WK1; Brad Knickerbocker, *WikiLeaks 101: Five Questions About Who Did What and When*, THE CHRISTIAN SCI. MONITOR, <<http://www.csmonitor.com/USA/2010/1201/WikiLeaks-101-Five-questions-about-who-did-what-and-when/Who-is-responsible-for-the-leaks>> (last visited Apr. 17, 2012).

152. See Stephanie Strom, *Pentagon Sees a Threat from Online Muckrakers*, N.Y. TIMES, Mar. 18, 2010, at A18.

153. See Scott Shane, *WikiLeaks Leaves Names of Diplomatic Sources in Cables*, N.Y. TIMES, Aug. 30, 2011, at A4.

154. See Kevin Poulsen & Kim Zetter, *U.S. Intelligence Analyst Arrested in Wikileaks Video Probe*, WIRED.COM (June 6, 2010), <<http://www.wired.com/threatlevel/2010/06/leak/>>.

155. The Assoc. Press, *Germany: An Appeal to Obama Over a U.S. Prisoner's Treatment*, N.Y. TIMES, Apr. 14, 2011, at A13; see also Elisabeth Bumiller, *Pentagon to Move Suspect in Leaks*, N.Y. TIMES, Apr. 20, 2011, at A12 (noting that Amnesty International had concerns over Manning's treatment); Mark Benjamin, *WikiLeakers and Whistle-Blowers: Obama's Hard Line*, TIME (Mar. 11, 2011), <<http://www.time.com/time/nation/article/0,8599,2058340,00.html>>. Philip J. Crowley, a State Department spokesman stated that the Pentagon's treatment of Manning was “ridiculous, counterproductive and stupid,” a comment leading to Crowley's subsequent resignation. See Bumiller, *supra*.

156. See Ellen Nakashima & Jerry Markon, *WikiLeaks Founder Could Face Charges*, WASH. POST, Nov. 30, 2010, at A1; Shane, *supra* note 9.

reported to be “unprecedented both in its scale and nature.”<sup>157</sup> Attorney General Eric Holder asserted publicly that publishing the government documents was a crime that should be prosecuted.<sup>158</sup> At the time of this writing, the outcome of that investigation has not been released publicly.<sup>159</sup>

Obama’s DOJ prosecuted at least four other individuals for whistleblowing-type activities involving providing classified information to the media. In 2010, the DOJ prosecuted Shamai Leibowitz, a former FBI translator, for sending classified information to a blogger.<sup>160</sup> Leibowitz pled guilty to disclosing the transcripts from conversations overheard by an FBI wiretap at the Israeli Embassy in Washington DC, claiming that he was publicizing what he considered to be “a violation of the law.”<sup>161</sup> The blogger who published the information agreed, stating that Leibowitz provided the transcripts to him “because of concerns about Israel’s aggressive efforts to influence Congress and public opinion, and fears that Israel might strike nuclear facilities in Iran, a move he saw as potentially disastrous.”<sup>162</sup> Leibowitz received a twenty-month prison sentence.<sup>163</sup>

Also in 2010, the Obama Administration charged Stephen J. Kim with violating the Espionage Act for allegedly providing classified information about North Korea to Fox News.<sup>164</sup> Kim is an expert on North Korea’s nuclear program who consulted with the State Department and talked with Fox about how North Korea might respond

157. Philip Dorling, *US Targets WikiLeaks Like No Other Organisation*, SYDNEY MORNING HERALD, Dec. 3, 2011, at 10, available at <<http://www.smh.com.au/technology/technology-news/us-targets-wikileaks-like-no-other-organisation-20111202-1obeo.html#ixzz1fVzUpHIT>>.

158. See Julian E. Barnes & Evan Perez, *Assange Probe Hits Snag*, WALL ST. J., Feb. 9, 2011, at A3; *Assange Making Arrangements to Meet Police, Lawyer Says*, CNN (Dec. 6, 2010, 1:59 PM EST), <<http://www.cnn.com/2010/US/12/06/wikileaks.investigation/index.html>>.

159. In November 2011, a federal judge permitted the DOJ to subpoena information about WikiLeaks-related Twitter accounts. See Declan McCullagh, *Second Judge Gives DOJ Access to WikiLeaks-related Twitter Accounts*, CNET (Nov. 10, 2011, 12:24 PM PST), <[http://news.cnet.com/8301-31921\\_3-57322538-281/second-judge-gives-doj-access-to-wikileaks-related-twitter-accounts/](http://news.cnet.com/8301-31921_3-57322538-281/second-judge-gives-doj-access-to-wikileaks-related-twitter-accounts/)>.

160. Scott Shane, *Leak Offers Look at Efforts by U.S. to Spy on Israel*, N.Y. TIMES, Sept. 6, 2011, at A1.

161. Gerstein, *supra* note 8.

162. Shane, *supra* note 160; see also Richard Silverstein, *Why I Published US Intelligence Secrets About Israel’s Anti-Iran Campaign*, TRUTHOUT (Oct. 14, 2011), <<http://www.truthout.org/why-i-published-us-intelligence-secrets-about-israels-anti-iran-campaign/1316550301>>.

163. Adam C. Estes, *Obama and Whistleblowers: Leak for Me but Not for Thee*, THE ATLANTIC WIRE (May 26, 2011), <<http://www.theatlanticwire.com/business/2011/05/obama-whistleblowers-war-dodd-frank/38192/>>.

164. Shane, *supra* note 9; Benjamin, *supra* note 155.

to proposed U.S. sanctions.<sup>165</sup> In January 2011, the DOJ arrested former CIA officer Jeffrey Sterling and charged him with giving information to *New York Times* reporter James Risen about “a classified clandestine operational program designed to conduct intelligence activities” and a “human asset” Sterling had handled for the agency.<sup>166</sup> Finally, in January 2012, the DOJ charged former CIA agent John Kiriakou with violating the Espionage Act by allegedly disclosing the identity of a CIA analyst to a journalist.<sup>167</sup> The Government Accountability Project asserted that the government targeted Kiriakou because he had made public, remarks questioning the use of waterboarding as an interrogation matter.<sup>168</sup>

Obama’s predecessors used Espionage Act prosecutions far more sparingly. Before Obama became President, the government charged only three individuals with violating the Espionage Act for giving information to non-government actors, such as the media. The most famous of these cases involved Daniel Ellsberg and the Pentagon Papers in 1971, in which Ellsberg provided defense-related classified reports to the *New York Times*.<sup>169</sup> The case against Ellsberg was dismissed because of the prosecutors’ ethical violations.<sup>170</sup> Previous to Leibowitz, the only successful Espionage Act prosecution of a government employee for giving classified information to a journalist occurred in 1984 when Samuel L. Morison was convicted of violating the Espionage Act by giving satellite photographs of a Soviet ship to *Jane’s Defense Weekly*, a British publication.<sup>171</sup> Finally, in 2005, Lawrence Franklin, a Pentagon analyst, was charged with providing classified information about potential attacks on American forces in Iraq to two employees of the American Israel Public Affairs Committee, a pro-Israel lobbying group.<sup>172</sup> He pled guilty, but claimed he did not

165. See Horton, *supra* note 8.

166. Pierre Thomas et al., *Ex-CIA Agent Jeffrey Sterling Arrested, Accused of Leaking to Reporter as Revenge*, ABC NEWS (Jan. 6, 2011), <<http://abcnews.go.com/US/Blotter/cia-agent-jeffrey-sterling-arrested-accused-leaking-reporter/story?id=12557291>>.

167. Savage, *supra* note 9.

168. Eric Tucker, *Ex-CIA Officer Charged with Leaking Secret Info*, <[http://www.salon.com/2012/04/06/ex\\_cia\\_officer\\_charged\\_with\\_leaking\\_secret\\_info/](http://www.salon.com/2012/04/06/ex_cia_officer_charged_with_leaking_secret_info/)> (last visited June 22, 2012).

169. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

170. See Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881, 899 n.115; William E. Lee, *Deep Background: Journalists, Sources, and the Perils of Leaking*, 57 AM. U. L. REV. 1453, 1477-78 (2008).

171. *United States v. Morison*, 844 F.2d 1057, 1060-61 (4th Cir. 1988); Kitrosser, *supra* note 170, at 899. President Clinton later pardoned Mr. Morison. See Eric Lichtblau & David Johnston, *Use of Espionage Law in Secrets Case Troubles Analysts*, N.Y. TIMES, Aug. 6, 2005, at A10.

172. See David Johnston & Eric Lichtblau, *Analyst Charged with Disclosing Military Secrets*, N.Y. TIMES, May 5, 2005, at A1.

want to hurt the United States; rather, he thought the lobbyists to whom he gave the information would advocate for his position with the Administration.<sup>173</sup>

#### b. Avoiding Better Statutory Protections

These criminal prosecutions present the most public and vivid indication of Obama's strong views regarding those considered to have "leaked" classified information to the media. However, it could be argued that these present isolated cases involving relatively few individuals.<sup>174</sup> Indeed, counterexamples exist in which the Obama DOJ dropped charges or investigations against individuals accused by the Bush Administration of improperly disclosing classified information. In 2009, the DOJ approved the recommendation from career prosecutors to withdraw charges against Steven J. Rosen and Keith Weissman,<sup>175</sup> who the Bush Administration had accused of receiving classified information from Lawrence Franklin, discussed above, and giving it to a reporter and an Israeli diplomat.<sup>176</sup> In 2011, Obama's DOJ also dropped investigations of intelligence community employees who admitted giving *New York Times*' reporters information that helped the *Times* expose Bush's domestic wiretapping program.<sup>177</sup>

173. See Lee, *supra* note 170, at 1482; Scott Shane & David Johnston, *Pro-Israel Lobbying Group Roiled by Prosecution of Two Ex-Officials*, N.Y. TIMES, Mar. 5, 2006, § 1, at 21. The judge sentenced Franklin to twelve and a half years in prison, see Lee, *supra* note 170, at 1486, Shane & Johnston, *supra*; however, the court subsequently reduced the sentence to ten months of home detention, see Gerstein, *supra* note 8; Shane, *supra* note 132.

174. Indeed, one news report asserted that the "scattered" way in which the six cases developed "support the notion that they were not the result of a top-down policy." Scott Shane & Charlie Savage, *Administration Took Accidental Path to Setting Record in Leak Cases*, N.Y. TIMES, June 19, 2012, at A14. In the same article, however, the reporters quoted Attorney General Eric Holder, defending the DOJ against criticism that it was not investigating leaks sufficiently by telling the Senate Judiciary Committee, "We have tried more leak cases—brought more leak cases during the course of this administration than any other administration." *Id.* The reporters also note that the President is promoting his prosecution record "as a political asset." *Id.* One other explanation for the increased prosecution could be that better technology makes the leakers easier to track down through email and cell phone records. *Id.*

175. Neil A. Lewis & David Johnston, *U.S. to Drop Spy Case Against Pro-Israel Lobbyists*, N.Y. TIMES, May 1, 2009, at A11. The prosecutors claimed that the judge had issued rulings making the case too difficult to prosecute. See *id.* For example, the judge rejected the prosecutors' attempt to conceal classified information at trial, which would force the government to disclose it publicly. See *id.*; see also Shane & Johnston, *supra* note 173 ("Some legal experts say the prosecution threatens political and press freedom, making a felony of the commerce in information and ideas that is Washington's lifeblood. Federal prosecutors are using the Espionage Act for the first time against Americans who are not government officials, do not have a security clearance and, by all indications, are not a part of a foreign spy operation.").

176. See Shane & Johnston, *supra* note 173.

177. See Charlie Savage, *No Prosecution Seen for Official in N.S.A. Leak*, N.Y. TIMES, April 27, 2011, at A17.

Given the inherent distinctions that can be made among individual prosecutions, perhaps the Obama Administration's stance regarding enhanced statutory protections for whistleblowers provides a more compelling example of its nuanced approach to national security whistleblowing. For years, whistleblower advocates and their allies in Congress supported legislation aimed at fixing numerous loopholes and defects in the primary legislation affecting federal government whistleblowers, the Whistleblower Protection Act.<sup>178</sup> In 2007, the House of Representatives passed H.R. 985 with an overwhelming bipartisan majority, 331-94.<sup>179</sup> The bill, called the Whistleblower Protection Enhancement Act of 2007 (WPEA), contained numerous improvements for federal whistleblowers, including access to jury trials in federal court and protections for a broad range of disclosures about government misconduct.<sup>180</sup> Importantly, H.R. 985 also provided new rights and protections to national security whistleblowers, who typically do not receive statutory protection and often must rely on internal agency administrative procedures to remedy any retaliation they experience for blowing the whistle.<sup>181</sup> Among other things, H.R. 985 protected national security whistleblowers who make disclosures about misconduct to a broad range of congressional and executive branch officials, and it allowed employees to bring claims of retaliation to federal court<sup>182</sup> – a process whistleblower advocates have claimed necessary to give full due process rights to government whistleblowers.<sup>183</sup> Additionally, the legislation barred revoking an employee's security clearance as retaliation for blowing the whistle<sup>184</sup> – a common form of retaliation currently not prohibited.<sup>185</sup> It also limited

178. See, e.g., S. REP. NO. 111-101, at 38 (2009) (detailing legislative attempts to pass improvements to the WPA).

179. See Final Vote Results for Roll Call 153 (Mar. 14, 2007), available at <<http://clerk.house.gov/evs/2007/roll153.xml>>. Two hundred twenty-nine Democrats and 102 Republicans voted in favor of the bill on March 14, 2007. See *id.*

180. See H.R. 985, 110th Cong. § 10 (2007).

181. I discuss the law currently affecting national security whistleblowers in more detail in Part III.B., *infra*.

182. See H.R. 985, 110th Cong. § 10 (2007). The protected disclosures would have mirrored the disclosures under the WPA, as amended by the WPEA, which would have greatly expanded the types of disclosures national security whistleblowers could make without fear of retaliation.

183. See Press Release, Nat'l Whistleblowers Ctr., Major Reversal: House Cuts Whistleblower Jury Trials, (Nov. 3, 2011), available at <[http://www.whistleblowers.org/index.php?option=com\\_content&task=view&id=1293&Itemid=178](http://www.whistleblowers.org/index.php?option=com_content&task=view&id=1293&Itemid=178)> (“Access to jury trials is a hallmark in all modern whistleblower laws and an absolutely essential provision to ensure that whistleblowers can have a fair hearing.”).

184. See H.R. 985, 110th Cong. § 10 (2007).

185. See *Hesse v. Dep't of State*, 217 F.3d 1372, 1380 (Fed. Cir. 2000).



the use of the “state secrets privilege” in cases brought by whistleblowers,<sup>186</sup> likely in response to the Bush Administration’s highly publicized use of the privilege to prevent an FBI whistleblower from bringing a claim in federal court.<sup>187</sup> The House bill required that a court resolve an issue on which the privilege is claimed in favor of the employee and also required the agency to submit a detailed report to Congress whenever it invoked the privilege.<sup>188</sup> By any measure, H.R. 985 would have dramatically improved the protections available to all federal government whistleblowers, specifically including national security whistleblowers.

As a candidate for President, Obama signed a declaration that he supported government whistleblower protections “under the framework of H.R. 985.”<sup>189</sup> However, Obama’s stance towards these provisions changed after he became President. Although H.R. 985 never became law,<sup>190</sup> in January 2009, the House attached to the stimulus bill measures identical to H.R. 985’s national security whistleblower provisions.<sup>191</sup> President Obama did not demand that they remain part of the stimulus bill, and the Senate removed them before passing the legislation in February 2009, a month after Obama took office.<sup>192</sup> The next month, members in the House introduced federal government whistleblower legislation again, and it contained protections for national security whistleblowers identical to H.R. 985.<sup>193</sup>

However, the Obama Administration indicated that it had reser-

186. The state secrets privilege permits the government to withhold revealing military and state secrets during a civil trial. See *United States v. Reynolds*, 345 U.S. 1, 7 (1953).

187. See MELISSA GOODMAN ET AL., *DISAVOWED: THE GOVERNMENT’S UNCHECKED RETALIATION AGAINST NATIONAL SECURITY WHISTLEBLOWERS* 11 (2007) (discussing claim of Sibel Edmonds).

188. See H.R. 985, 110th Cong. § 10 (2007).

189. See R. Jeffrey Smith & Joby Warrick, *Obama, Gates at Odds Over Proposed Protections for National Security Whistleblowers*, WASH. POST, Feb. 18, 2009, at A3; *Candidate Surveys*, NAT’L WHISTLEBLOWERS CTR., <[http://www.whistleblowers.org/index.php?option=com\\_content&task=view&id=29&Itemid=58](http://www.whistleblowers.org/index.php?option=com_content&task=view&id=29&Itemid=58)> (last visited Apr. 17, 2012).

190. The Senate passed a companion bill, S. 274, but Congress never reconciled the two bills. Notably, S. 274 did not contain the added protections for national security whistleblowers. See S. 274, 110th Cong. (2007).

191. See H.R. 1, 111th Cong. § 1270 (2009); Brittany R. Ballenstedt, *House Backs Whistleblower Provision in Stimulus Bill*, GOVEXEC.COM (Jan. 28, 2009), <<http://www.govexec.com/dailyfed/0109/012809b1.htm>>.

192. See 156 CONG. REC. H8,974 (daily ed. Dec. 22, 2010) (Statement of Rep. Van Hollen) (noting that provisions of H.R. 1507 were “stripped out of the Recovery Act during the conference with the Senate”); Smith & Warrick, *supra* note 189 (noting that the national security whistleblower provisions were dropped from the stimulus bill “after Sen. Susan Collins (Maine) and other Republicans objected to their inclusion and the White House did not insist on it”).

193. See Whistleblower Protection Enhancement Act of 2009, H.R. 1507, 111th Cong.

vations about the national security whistleblower provisions.<sup>194</sup> Indeed, in a committee hearing on the new bill, H.R. 1507, an Obama Administration representative, Rajesh De from DOJ, approved of many of the bill's improvements for whistleblowers generally, but objected to H.R. 1507's enhancements for national security whistleblowers.<sup>195</sup> De asserted that a provision permitting federal employees a chance to appeal to a federal court when an agency revoked the employee's security clearance was "inconsistent with the traditional deference afforded Executive Branch decision-making in this area."<sup>196</sup> De also objected to federal district court review of MSPB decisions regarding national security whistleblowers because of "the sensitive nature of the issues involved" with national security whistleblowers.<sup>197</sup> The Obama Administration instead endorsed retaliation protection for national security whistleblowers through administrative procedures located entirely within the executive branch.<sup>198</sup>

At the same time, the Senate considered S. 372, another version of the WPEA, and held hearings at which De provided substantially similar testimony on behalf of the Obama Administration.<sup>199</sup> In December 2009, a Senate committee endorsed S. 372, which provided for national security whistleblower protection through an administrative, rather than a judicial, process.<sup>200</sup> By providing some antiretaliation protection for national security whistleblowers, S. 372 potentially improved the current lack of any real protection;<sup>201</sup> however, the bill included significantly less robust procedural protections than the judicial review found in H.R. 1507 (and H.R. 985 before that).<sup>202</sup> The

194. Joe Davidson, *Whistleblower Advocates Push for More from Obama*, WASH. POST, May 15, 2009, at A17.

195. See *Protecting the Public from Waste, Fraud and Abuse: Hearing on H.R. 1507, The Whistleblower Protection Enhancement Act of 2009 Before the H. Comm. on Oversight & Gov't Reform*, 111th Cong. 7 (2009) (statement of Rajesh De, Deputy Ass't Att'y Gen., Office of Legal Policy, Dep't of Justice) [hereinafter De House Statement], available at <<http://democrats.oversight.house.gov/images/stories/documents/20090513192835.pdf>>.

196. See *id.* at 9-10.

197. See *id.* at 11.

198. See *id.* at 7-10.

199. See *Hearing on S. 372 - The Whistleblower Protection Enhancement Act of 2009 Before the S. Subcomm. on Oversight of Gov't Mgmt., the Fed. Workforce, & the Dist. of Columbia*, 111th Cong. 7 (2009) (statement of Rajesh De, Dep. Ass't Att'y Gen., Office of Legal Policy, Dep't of Justice), available at <<http://www.justice.gov/olp/pdf/rajeshde-whistleblower-senate.pdf>>.

200. See S. REP. NO. 111-101, at 76-80 (2009).

201. See discussion *infra* Part III.B. (discussing current legal regime affecting national security whistleblowers). The version of S. 372 originally introduced in the Senate did not contain any protections for national security whistleblowers. See 155 CONG. REC. S1435-38 (daily ed. Feb. 3, 2009) (providing text as introduced in Senate).

202. Instead, S. 372 required whistleblowers to appeal an employment decision to the agen-

Senate committee specifically accepted the Obama Administration's position that an administrative process would "better protect national security information."<sup>203</sup> Moreover, unlike H.R. 1507, S. 372 did not contain any provisions related to the government's use of the state secrets privilege, nor did it provide for outside review of an agency decision to revoke an employee's security clearance.<sup>204</sup>

Given De's testimony at the House and Senate hearings on the two versions of the WPEA, some whistleblower advocates blamed Obama for abandoning the strong national security whistleblower provisions of H. 1507 for the weaker version in S. 372. Not only did the Obama Administration suggest the administrative protections as an alternative to the judicial remedy of H.R. 1507, but also it became clear that the White House and national security officials, who had long objected to strong protections for intelligence community employees, worked with the Senate committee to craft a compromise bill with the weaker provisions.<sup>205</sup> The National Whistleblowers Center lamented that S. 372's "bad" provisions concerning national security whistleblowers "have the tacit or express approval of the Obama Administration, which throughout this process has deferred to the views of the federal agency managers and heads of the intel agencies."<sup>206</sup> News reports also indicated that Obama officials even weakened protections for FBI whistleblowers initially,<sup>207</sup> although the bill ultimately passed by the Senate in December 2010 retained the FBI's

cy head (rather than to a more independent Inspector General), who could control the resulting investigation. See S. REP. NO. 111-101, at 70 (2009). As part of the investigation, the agency could submit *ex parte* information to the agency decision maker if "the agency determines that the interests of national security so warrant." *Id.* The whistleblower would have a limited ability to subpoena witnesses or to compel production of evidence. See *id.* A whistleblower could appeal the agency decision to an administrative board created by the new law; however, the board would not conduct a hearing and would be dependent on the record accumulated by the agency (the same agency accused of retaliation), including credibility determinations made by the agency. See *id.* at 71. The board proceedings would not need to be on the record nor even conducted by administrative law judges, and the board could not share any of the *ex parte* evidence with the whistleblower. See *id.* The board could award damages (capped at \$300,000) but could not order reinstatement of the employee. See *id.* at 72. Finally, the bill would have permitted agencies to fire whistleblowers without any review whatsoever when the agency itself determines that national security requires it. See *id.* at 73.

203. *Id.* at 30.

204. See *id.* at 79-80.

205. Tom LoBianco, *WH Sought to Weaken Law on Whistleblowing*, WASH. TIMES, Aug. 7, 2009, at A1; Smith & Warrick, *supra* note 189.

206. See David Colapinto, *Shine More Sunlight on S. 372*, WHISTLEBLOWERS PROT. BLOG (Mar. 10, 2010), <[www.whistleblowersblog.org/2010/03/articles/whistleblowers-governmentempl/terrorism/shine-more-sunlight-on-s-372/](http://www.whistleblowersblog.org/2010/03/articles/whistleblowers-governmentempl/terrorism/shine-more-sunlight-on-s-372/)>.

207. See LoBianco, *supra* note 205; Kasie Hunt, *Critics Question Whistleblower Bill*, POLITICO (Mar. 9, 2010, 4:44 AM EDT), <<http://www.politico.com/news/stories/0310/34105.html>>.

current protections.<sup>208</sup>

As the legislative session for the 111th Congress wound to a close in December 2010, the House took up a measure identical to S. 372 rather than its own H.R. 1507, which had languished since the committee hearing eighteen months earlier. Yet, even the watered-down provisions for intelligence community whistleblowers proved to be too much for many Republicans,<sup>209</sup> and the House amended its version of S. 372 to delete all of the national security provisions.<sup>210</sup> A lone Senator put a hold on the bill when it returned to the Senate, and the 111th Congress ended without passing any version of the WPEA.<sup>211</sup> Professor Geoffrey Stone, Obama's former colleague at the University of Chicago Law School, complained that the Obama Administration "cooled to the idea" of a statute with enhanced federal employee whistleblower protection and "let it die" in the Senate.<sup>212</sup>

However, after several Senators reintroduced the Whistleblower Protection Enhancement Act in 2011, generally along the same lines as S. 372 from the previous Congress,<sup>213</sup> Obama publicly supported it.<sup>214</sup> This bill keeps many of the improvements to the WPA found in previous versions of the bill, but retains the administrative remedies for national security whistleblowers.<sup>215</sup> Interestingly, instead of detailing specific enforcement procedures like S. 372, the proposed legislation simply grants the President the power to provide for enforcement

208. Compare 156 CONG. REC. S8803 (daily ed. Dec. 10, 2010) (detailing S. Amdt. 4760 to S. 372, which did not include the FBI in the groups to which the administrative procedures were available under Section 201 and which the Senate passed on Dec. 10, 2010) with S. REP. NO. 111-101, at 68 (2009) (including FBI in groups affected by administrative procedures) and 156 Cong. REC. S8813 (daily ed. Dec. 10, 2010) (reporting Committee's version to the Senate).

209. See 156 CONG. REC. H8974 (daily ed. Dec. 22, 2010) (Statement of Rep. Towns) ("I am disappointed that we could not come to an agreement with the Republican side on extending protections to employees in the Intelligence Community.").

210. See 156 CONG. REC. H8966-74 (daily ed. Dec. 22, 2010).

211. House Republican Leadership Asked Senator to Place "Secret Hold" on Federal Whistleblower Bill, GOV'T ACCOUNTABILITY PROJECT (Apr. 4, 2011), <<http://www.whistleblower.org/press/press-release-archive/1037-house-republican-leadership-asked-senator-to-place-qsecretholdq-on-federal-whistleblower-bill>>.

212. Geoffrey R. Stone, *Our Untransparent President*, N.Y. TIMES, June 26, 2011, at A21.

213. See S. 743, 112th Cong. (2011). On Oct. 19, 2011, the bill passed unanimously out of the Senate Committee on Homeland Security and Governmental Affairs. See Dylan Blaylock, *GAP Praises Senate Committee Vote on Whistleblower Protection Enhancement Act*, GOV'T ACCOUNTABILITY PROJECT (Oct. 19, 2011), <<http://www.whistleblower.org/blog/31-2010/1556-gap-praises-senate-committee-vote-on-whistleblower-protection-enhancement-act>>.

214. See Amanda Becker, *Obama Pushes for Whistle-Blower Bill*, ROLL CALL NEWS (Sept. 21, 2011), <[http://www.rollcall.com/issues/57\\_32/Obama-Pushes-for-Whistle-Blower-Bill-08883-1.html?pos=hbtxt](http://www.rollcall.com/issues/57_32/Obama-Pushes-for-Whistle-Blower-Bill-08883-1.html?pos=hbtxt)>.

215. See S. 743, 112th Cong. § 201 (2011).

of its protections along the same lines as the WPA.<sup>216</sup> The administrative remedy seems to appeal to Obama; he has declared that even if Congress does not pass the WPEA, his Administration might use executive orders to implement what he can.<sup>217</sup>

Thus, the Obama Administration took a more nuanced approach to national security whistleblowing than candidate Obama's original endorsement of H.R. 985 would have indicated. Although the Obama Administration agreed the law should protect national security whistleblowers, it objected to providing them the same type of rights available to other whistleblowers. Most dramatically, the Administration endorsed internal, administrative remedies instead of the House's preferred judicial remedies.

### c. Journalist Subpoenas

The Obama Administration also focused on journalists who revealed classified information. James Risen presents one specific example. He co-authored the *New York Times* article that exposed the Bush Administration's domestic wiretapping program and wrote a book, *State of War*, which described a failed government attempt to undermine Iran's nuclear-weapons program.<sup>218</sup> Both the Bush and Obama Administrations investigated the sources for Risen's stories for years before Obama's prosecutors finally attempted to force Risen to testify against Jeffrey Sterling, the former C.I.A. officer charged with revealing national security information to Risen.<sup>219</sup> In fact, the Bush Administration dropped its attempt to subpoena Risen; however, the Obama prosecutors revived the effort by subpoenaing Risen's credit reports as well as his personal bank and telephone records as part of their investigation.<sup>220</sup> Issuing such subpoenas to a member of the press presents a host of thorny legal issues, including a potential clash with First Amendment protections. Accordingly, the Justice Department's own rules require the Attorney General to approve such subpoenas, demonstrating how seriously the Obama Administra-

216. *See id.*

217. *See* Becker, *supra* note 214.

218. *See* Jane Mayer, *James Risen's Subpoena*, THE NEW YORKER (May 24, 2011), <<http://www.newyorker.com/online/blogs/newsdesk/2011/05/james-risens-subpoena.html>>.

219. *See* Greenwald, *supra* note 8; Mayer, *supra* note 218.

220. *See* Josh Gerstein, *Feds Spy on Reporter in Leak Probe*, POLITICO (updated Feb. 25, 2011, 12:15 PM EST), <<http://www.politico.com/news/stories/0211/50168.html>>; Glenn Greenwald, *Climate of Fear: Jim Risen v. the Obama Administration*, SALON (June 23, 2011, 4:24 AM CDT), <[http://www.salon.com/2011/06/23/risen\\_3/](http://www.salon.com/2011/06/23/risen_3/)>.

tion pursued Sterling.<sup>221</sup> Indeed, the prosecutor's motion requesting the subpoena called Risen "an eyewitness to the serious crimes" at issue in the case, namely the disclosure of national security information.<sup>222</sup> Ultimately, a federal judge quashed the subpoena this past summer.<sup>223</sup>

The Risen subpoena reflects a policy reversal for Obama with regard to a reporter's right to protect sources, many of whom, of course, could be called whistleblowers. In 2007 as a U.S. Senator, Obama co-sponsored the Free Flow of Information Act, which would provide a federal journalist-source privilege allowing journalists to protect the confidentiality of their sources except in extreme circumstances, a right recognized by forty-nine states and the District of Columbia.<sup>224</sup> As a candidate for President, Obama promised to give protection to journalists from having to reveal their confidential sources.<sup>225</sup> However, as President, Obama demanded that exceptions exist to require a reporter to reveal a source in order to protect national security,<sup>226</sup> and he insisted that judges defer to the executive branch's judgment on whether national security would be affected.<sup>227</sup>

Not surprisingly, whistleblower advocates have raised strong objections to these events. Thomas Drake's lawyer, Jesselyn Radack, of the Government Accountability Project, called Obama's actions "brutal" and "a recipe for the slow poisoning of a democracy."<sup>228</sup> The Os-

221. See Mayer, *supra* note 218; Shane, *supra* note 132 ("By Justice Department rules, investigators may seek to question a journalist about his sources only after exhausting other options and with the approval of the attorney general. Subpoenas have been issued for reporters roughly once a year over the last two decades, according to Justice Department statistics, but such actions are invariably fought by news organizations and spark political debate over the First Amendment.").

222. See Mayer, *supra* note 218.

223. Greenwald, *supra* note 144.

224. Stone, *supra* note 212. To overcome the privilege, the government would have to prove that disclosing the information would prevent significant harm to national security. See *id.*

225. See Charlie Savage, *White House Proposes Changes in Bill Protecting Reporters' Confidentiality*, N.Y. TIMES, Oct. 1, 2009, at A17; Clint Hendler, *A Change That's Hard to Believe In*, COLUM. JOURNALISM REV. (Oct. 2, 2009, 10:12 AM), <[http://www.cjr.org/campaign\\_desk/a\\_change\\_thats\\_hard\\_to\\_believe.php](http://www.cjr.org/campaign_desk/a_change_thats_hard_to_believe.php)> (providing transcript and quoting campaign speech by Obama from Apr. 15, 2008).

226. See Shane Harris, *Plugging the Leaks*, THE WASHINGTONIAN, Aug. 2010, at 33, available at <<http://www.washingtonian.com/articles/people/plugging-the-leaks/>>; Savage, *supra* note 225 ("The Administration this week sent to Congress sweeping revisions to a 'media shield' bill that would significantly weaken its protections against forcing reporters to testify" by not permitting protections for leaks involving "significant" harm to national security).

227. Stone, *supra* note 212.

228. Thomas Drake & Jesselyn Radack, *A Surprising War on Leaks Under Obama*, PHILLY.COM (Aug. 1, 2011), <[http://articles.philly.com/2011-08-01/news/29838846\\_1\\_whistleblowers-jesselyn-radack-obama](http://articles.philly.com/2011-08-01/news/29838846_1_whistleblowers-jesselyn-radack-obama)>.

car-nominated director of a film about Daniel Ellsberg, of Pentagon Papers fame, claimed that Obama is the “worst President in terms of his record on whistleblowing.”<sup>229</sup> Obama’s proposed national security provisions for the WPEA provoked substantial criticism as well.<sup>230</sup> His former colleague, Professor Stone, criticized some of Obama’s moves in a *New York Times* editorial titled, “Our Untransparent President.”<sup>231</sup>

The Obama Administration’s actions provoked strong reactions from the media too. Glenn Greenwald from *Salon.com* called Obama’s prosecutions “the most aggressive crusade to expose, punish and silence ‘courageous and patriotic’ whistleblowers by any President in decades.”<sup>232</sup> *The Atlantic* complained that Obama is “waging a war on whistleblowers within the federal government,”<sup>233</sup> a sentiment others have echoed.<sup>234</sup>

However, the Obama Administration’s involvement in the winding legislative path of the WPEA indicates a more nuanced attitude towards national security whistleblowers than demonstrated by the media hyperbole. Obama is not necessarily conducting a “war” on national security whistleblowers, because he has supported legislation protecting them. However, he may be conducting a battle for national security secrecy. He prioritized the protection of classified national security information by attempting to limit the ways in which intelligence community whistleblowers could disclose misconduct and the

229. Ben Dowell, *Barack Obama Worst President for Whistleblowers, Says Film-maker*, THE GUARDIAN (June 9, 2011, 13:22 EDT), <<http://www.guardian.co.uk/media/2011/jun/09/barack-obama-worst-president-for-whistleblowers>>.

230. See Julia Davis, *Here Comes the Bride of Frankenstein*, EXAMINER.COM (Aug. 5, 2011), <<http://www.examiner.com/homeland-security-in-los-angeles/here-comes-the-bride-offrankenstein>> (“The WPEA is replete with deceptive guillotines masquerading as haircut machines.”); *Greenhouse: Senate Bill “Treats Whistleblowers as Second-class Citizens”*, Nat’l Whistleblowers Ctr. (Dec. 15, 2010), <[http://www.whistleblowers.org/index.php?option=com\\_content&task=view&id=1166&Itemid=189](http://www.whistleblowers.org/index.php?option=com_content&task=view&id=1166&Itemid=189)> (noting that Bunnatine Greenhouse, an Army Corps of Engineers whistleblower who testified before Congress on whistleblower protections, stated that S. 372 “leaves national security whistleblowers out in the cold”); LoBianco, *supra* note 205 (quoting Tom Devine from the Government Accountability Project stating that “the White House changes [to the WPEA] created obstacles that could stymie national security whistleblowers, such as a new review panel to hear complaints from intelligence employees who bring allegations of wrongdoing to light”); *Senate Passes S.372: A Bad Deal for Whistleblowers*, Nat’l Whistleblowers Ctr. (Dec. 11, 2010), <[http://www.whistleblowers.org/index.php?option=com\\_content&task=view&id=1163&Itemid=71](http://www.whistleblowers.org/index.php?option=com_content&task=view&id=1163&Itemid=71)> (stating that S. 372 does “little to aid” national security whistleblowers).

231. See Stone, *supra* note 212.

232. Greenwald, *supra* note 8; see also Benjamin, *supra* note 155 (noting that the Obama Administration “is rapidly establishing a record as the most aggressive prosecutor of alleged government leakers in U.S. history”).

233. See Estes, *supra* note 163.

234. See, e.g., Greenwald, *supra* note 8; Horton, *supra* note 8.

procedures they could invoke to remedy any retaliation they encounter. For Obama, administrative (rather than judicial) remedies for whistleblowers keep national security secrets within the executive branch and do not expose them to outsiders like Congress, judges, or the media. The criminal prosecutions and the Obama Administration's focus on "leaks" to the media supported the goal of national security secrecy. Obama appears to believe that not all whistleblowers are bad, just the ones who publicly disclose classified information when they blow the whistle. To put it bluntly, when it comes to national security, Obama would rather protect secrecy than protect whistleblowing.

This distinction between Obama's broad support for whistleblowing generally and his lack of support, often even condemnation, of whistleblowing about national security (or, more disparagingly, "leaking") deserves further exploration. Part III, below, analyzes the source for Obama's disdain for leaking and concludes that Obama's stance continues a long-standing presidential attitude toward national security whistleblowing based on constitutional separation of powers concerns. Obama, however, may be unique among his predecessors because of his strong support for other types of whistleblowers, making the distinction more apparent. Part IV evaluates the merits of Obama's singular distinction between national security whistleblowers and other types of whistleblowers.

### III. WHISTLEBLOWING, NATIONAL SECURITY, AND THE SEPARATION OF POWERS

Conflicts over secrecy . . . are conflicts over power: the power that comes through controlling the flow of information.

*Sissela Bok (1982)*<sup>235</sup>

From the earliest days of the republic, the government has had to consider how to respond to executive branch employees who disclose misconduct in the national security arena. As Stephen Kohn, a well-known whistleblower advocate and lawyer, pointed out in *The New York Times*, Congress has encouraged people to report abuse and illegal conduct since the days of the Revolutionary War, when ten American sailors informed Congress that their commander treated prisoners of war inhumanly.<sup>236</sup> After the commander retaliated against

235. BOK, *supra* note 12, at 19.

236. See Stephen M. Kohn, *The Whistle-Blowers of 1777*, N.Y. TIMES, June 13, 2011, at A23.



the whistleblowers, Congress passed what Mr. Kohn called “America’s first whistle-blower protection law”:

That it is the duty of all persons in the service of the United States, as well as all other inhabitants thereof, to give the earliest information to Congress or any other proper authority of any misconduct, frauds or misdemeanors committed by any officers or persons in the service of these states, which may come to their knowledge.<sup>237</sup>

Two centuries later Daniel Ellsberg released the Pentagon Papers to the *New York Times*, resulting in his prosecution under the Espionage Act. The landmark Supreme Court opinion that arose out of that case addressed the First Amendment rights of the *recipient* of classified information, but left open the question regarding the legal rights a whistleblower may have to disclose classified information about illegal or improper government conduct.<sup>238</sup> Most recently, the “War on Terror” that began after the September 11, 2001 attacks led to numerous government employees publicly disclosing information that touched on national security. These individuals believed they reported illegal or unethical government acts, such as the warrantless wiretapping by the National Security Agency,<sup>239</sup> the CIA renditions and water torture of suspected terrorists,<sup>240</sup> and the Abu Ghraib prisoner abuse.<sup>241</sup>

These examples and others follow a similar pattern and reinforce the definition of “national security whistleblower” I set out above: an executive branch employee who either works in the “intelligence community” or reveals classified information, or both.<sup>242</sup> Ellsberg met both definitions: he worked for the Department of Defense and revealed classified information.<sup>243</sup> Thomas Drake worked for the National Security Agency, but claims not to have disclosed anything

237. *See id.*

238. *See* N.Y. Times v. United States, 403 U.S. 713, 714 (1971) (per curiam); Lee, *supra* note 170, at 1478 n.133.

239. *See* GOODMAN ET AL., *supra* note 187, at 14 (discussing case of Russell Tice); Michael P. Scharf & Colin T. McLaughlin, *On Terrorism and Whistleblowing*, 38 CASE W. RES. J. INT’L L. 567, 573-74 (2006); Michael Isikoff, *The Fed Who Blew the Whistle*, NEWSWEEK, Dec. 22, 2008, at 40, available at <<http://www.thedailybeast.com/newsweek/2008/12/12/the-fed-who-blew-the-whistle.html>> (discussing the case of Thomas Tamm who told the *New York Times* that the NSA was intercepting phone calls and emails in U.S. without judicial warrants).

240. *See* Scharf & McLaughlin, *supra* note 239, at 572-74; Jameel Jaffer & Larry Siems, *Honoring Those Who Said No*, N.Y. TIMES, Apr. 28, 2011, at 25.

241. *See* Scharf & McLaughlin, *supra* note 239, at 572-74; Jaffer & Siems, *supra* note 240.

242. *See supra* Part II.B.

243. *See* Daniel Ellsberg, *Secrecy and National Security Whistleblowing*, 77 SOC. RES. 773, 787-88 (2010).

classified.<sup>244</sup> Conversely, Thomas Tamm worked for the DOJ (not technically part of the “intelligence community”), but helped blow the whistle on the highly classified, but arguably illegal, NSA wire-tapping program.<sup>245</sup> In the typical pattern, the national security employee discovers conduct the employee believes to be illegal or immoral, often relating to classified or confidential information, and tells Congress or the media about it.<sup>246</sup> Most recently, as noted above, the Obama Administration has ratcheted up government reaction to such actions by criminally prosecuting employees who arguably could be called whistleblowers.<sup>247</sup>

One explanation for Obama’s intense reaction towards national security whistleblowers may be that such whistleblowers present a President with a unique dilemma. On the one hand, presidential decision making, particularly about national security, requires some amount of secrecy.<sup>248</sup> Executive branch officials need some private space in order to provide candid advice to the President and to vet proposals without the distorting impact of public scrutiny. Employees who blow the whistle undermine this process and destroy the ability of Presidents to keep what one author has called “necessary secrets.”<sup>249</sup> On the other hand, the Constitution promotes government transparency and Congressional oversight of the executive branch.<sup>250</sup> Whistleblowers who expose misconduct play an important role in making the government transparent and assisting in inter-branch oversight. In other words, President Obama’s nuanced approach to national security whistleblowing is part of a larger context related to these tensions that, at their core, result from the Constitution’s sepa-

244. See Mayer, *supra* note 8, at 55.

245. See Isikoff, *supra* note 239; Savage, *supra* note 177, at A17.

246. See generally LOUIS FISHER, CRS REPORT FOR CONGRESS: NATIONAL SECURITY WHISTLEBLOWERS (2005), available at <<http://www.fas.org/sgp/crs/natsec/RL33215.pdf>>; GOODMAN ET AL., *supra* note 187; Katel, *supra* note 32, at 265; Lee, *supra* note 170, at 1454-55. For example, Jesselyn Radack, a former FBI legal counsel, told a reporter about alleged “barbaric” treatment of John Walker Lindh, the “American Taliban,” after his arrest, and claimed to have been retaliated against as a result. See Drake & Radack, *supra* note 228. Radack claims to have “warned the Justice Department against interrogating [Lindh] without an attorney” and “exposed the FBI’s ethics violations in deciding to proceed, its barbaric treatment of him, and the mysterious disappearance of evidence of the warning from DOJ files.” *Id.*; see also Eric Lichtblau, *Dispute Over Legal Advice Costs a Job and Snarls a Nomination*, N.Y. TIMES, May 22, 2003, at A15.

247. See *supra* text accompanying notes 141-73.

248. See BOK, *supra* note 12, at 191.

249. See generally GABRIEL SCHOENFELD, NECESSARY SECRETS: NATIONAL SECURITY, THE MEDIA, AND THE RULE OF LAW (2011).

250. See Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 522 (2007).

ration of powers among co-equal branches of government.<sup>251</sup>

### A. Valuing Oversight and Transparency over Secrecy

Whistleblowing, particularly by executive branch employees to Congress, brings to a head these arguments about the competing needs for executive secrecy and Congressional oversight. Such arguments have resulted in various attempts to balance these opposing interests depending on the circumstances surrounding the whistleblowing. Presidents of both political parties have long maintained that the chief executive can keep some secrets from Congress in order to do the President's job effectively.<sup>252</sup> Thomas Jefferson noted, "The Senate is not supposed by the Constitution to be acquainted with the concerns of the Executive Department. It was not intended that these should be communicated to them."<sup>253</sup> Indeed, some commentators have asserted that the President's ability to keep secrets presents one of the great strengths of the executive branch.<sup>254</sup> Professor Heidi Kitrosser examines these arguments and goes one step further by asserting that "[i]t is virtually inevitable that the President's constitutional capacity for secrecy expands dramatically over time"<sup>255</sup> due to the bureaucratic and technological realities of the office.<sup>256</sup> Obama's

251. See FISHER, *supra* note 246, at 2 ("Whistleblower activity is often viewed as a struggle between the executive and legislative branches.").

252. See, e.g., OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 2701 – INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2010, at 1 (2009), available at <<http://www.presidency.ucsb.edu/ws/index.php?pid=86389>> (opposing changes to broaden executive branch reporting requirements to Congress because they "would undermine what the executive branch refers to as a 'fundamental compact between the Congress and the President' regarding the reporting of intelligence activities, 'an arrangement that for decades has balanced congressional oversight responsibilities with the President's responsibility to protect sensitive national security information'"); Kathleen Clark, "A New Era of Openness?": *Disclosing Intelligence to Congress Under Obama*, 26 CONST. COMMENT. 313, 327-28 (2010) ("For decades, Presidents have claimed the right to control classified information and internal legal advice."); Katel, *supra* note 32, at 272 (quoting President George W. Bush official asserting that executive privilege doctrine includes keeping "intra-agency deliberative materials prepared for senior officers in executive departments" from Congress); Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049, 1061 (2008).

253. THOMAS JEFFERSON, *Opinion on the Powers of the Senate* (Apr. 24, 1790), in THE JEFFERSONIAN CYCLOPEDIA (John P. Foley ed., 1900), quoted in Glenn Sulmasy, *Panel: Secrecy and Barriers to Open Government*, transcript from Symposium: *Left Out in the Cold? The Chilling of Speech, Association, and the Press in Post-9/11 America*, 57 AM. U. L. REV. 1229, 1233 n.56 (2008).

254. See, e.g., Kitrosser, *supra* note 170, at 887 (discussing writing of Alexander Hamilton and John Jay).

255. See *id.*

256. See *id.* at 887-89.

first signing statement, noted above, demonstrates that he takes the traditional executive's view that the President should be able to control federal employee communications to Congress "where such communications would be unlawful or would reveal information that is properly privileged or otherwise confidential."<sup>257</sup> In contrast, Congress and others have insisted that the legislative branch maintains constitutional authority to oversee all of the executive's actions,<sup>258</sup> including those related to national security. Congress, as a representative body, provides the best means for public oversight in a democracy, but only if Congress has access to information about the government's programs.<sup>259</sup>

Over the last century, each branch has erected legal bulwarks in this intra-governmental dispute between transparency and secrecy as it relates to executive branch employees providing information to Congress to assist the legislative branch in its oversight responsibilities. For example, in 1902 and 1909, Presidents Roosevelt and Taft, respectively, issued "gag" orders in which they ordered executive branch employees to speak with Congress only if approved by their department head.<sup>260</sup> Congress became concerned that these orders would stifle its ability to oversee the executive branch, and, in 1912, it passed the Lloyd-LaFollette Act,<sup>261</sup> rejecting these orders and declaring that no one should interfere with the "right" of federal employees to talk to Congress.<sup>262</sup>

The debate continued in more modern times. When Congress

257. Statement by the President *supra* note 130. The law prohibited the use of appropriations to pay salaries of anyone who "interferes with or prohibits" communications between federal employees and Congress related to the employee's job or agency. Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, 123 Stat. 684, Div. D, § 714(1) & 714(2).

258. See SEN. REP. NO. 111-101, at 27 (2009) (noting that a previous Senate committee had determined that a bill permitting intelligence community employees to disclose information to Congress was constitutional because "the regulation of national security information, while implicitly in the command authority of the President, is equally in the national security and foreign affairs authorities vested in Congress by the Constitution"); Katel, *supra* note 32, at 272 (quoting memo from Congressional Research Service attorney concluding that "Congress has a clear right and recognized prerogative . . . to receive from officers and employees of the agencies and departments of the United States accurate and truthful information regarding the federal programs and policies"); Kitrosser, *supra* note 252, at 1063-64.

259. See Morton H. Halperin & Daniel N. Hoffman, *Secrecy and the Right to Know*, 40 LAW & CONTEMP. PROBS. 132, 132 (1976) ("Congress, acting in behalf of the public, should first direct, and then oversee executive Administration.").

260. See FISHER, *supra* note 246, at 2-3.

261. 37 Stat. 555, § 6 (1912). This language was carried forward and supplemented by the Civil Service Reform Act of 1978 and is codified as permanent law. See 5 U.S.C. § 7211 (2006).

262. See FISHER, *supra* note 246, at 3; Thomas Newcomb, *In from the Cold: The Intelligence Community Whistleblower Protection Act of 1998*, 53 ADMIN. L. REV. 1235, 1239 n.10 (2001).

passed the Inspector General Act of 1978,<sup>263</sup> it clashed with the President over whether Inspector Generals (IGs) must report findings of misconduct to Congress.<sup>264</sup> The House originally required IGs to report “particularly serious or flagrant” concerns to Congress within seven days after discovery and without obtaining approval from executive branch agency heads.<sup>265</sup> The Office of Legal Counsel objected because the provision potentially conflicted with the President’s constitutional right to withhold information from Congress on the basis of executive privilege: the President claimed the authority to control whether and how executive branch IGs should report information to Congress.<sup>266</sup> The Senate version of the bill, which ultimately became law, compromised and required IGs to report “particularly serious or flagrant” concerns to agency heads, who should then provide them to Congress.<sup>267</sup> The Senate Report on the provision acknowledges, however, that “the President’s constitutional privilege for confidential communications” may require an agency head to alter or delete information before reporting to Congress.<sup>268</sup> This awkward compromise between the two branches gives Congress some oversight over the most serious problems reported to IGs, but appears to leave the President with the power (through his agency heads) to conceal what he considers constitutionally privileged information.

The quarrel extends beyond the IG process. Since the early 1980s, Presidents have required executive branch employees to sign nondisclosure agreements, while Congress has refused to provide any funds to enforce the agreements or to pay the salary of any executive branch official who prevents an employee from communicating with Congress.<sup>269</sup> Congress repeatedly passed provisions in appropriation bills that require the nondisclosure agreements both to prohibit employees from disclosing classified information *and* to clarify that the prohibition does not apply to disclosures to Congress or to law enforcement related to a substantial violation of law.<sup>270</sup>

263. 5 U.S.C. app. § 5(d) (2006).

264. See Newcomb, *supra* note 262, at 1257-60.

265. See *id.* at 1258 (citing S. REP. NO. 95-1071, at 30-32, summarized in pertinent part in, H.R. REP. NO. 105-747, at 18-19 (1998)).

266. See *id.* (citing S. REP. NO. 95-1071, at 30-32, summarized in pertinent part in, H.R. REP. NO. 105-747, at 18-19 (1998)).

267. See 5 U.S.C. app. § 5(d); Newcomb, *supra* note 262, at 1258-59.

268. See Newcomb, *supra* note 262, at 1258-59 (citing S. REP. NO. 95-1071, at 31-32 (1978), quoted in H.R. REP. NO. 105-747, at 18-19 (1998)).

269. See FISHER, *supra* note 246, at 24-28.

270. See *id.* at 28.

Although President Obama supported whistleblower protections generally, he demonstrated a willingness to continue the arguments made by his predecessors for a strong executive privilege. For example, the Obama Administration refused to allow its social secretary to testify before Congress regarding security at a White House dinner because, as Obama's press secretary noted, "[b]ased on the separation of powers, staff here don't go to testify in front of Congress."<sup>271</sup>

Nevertheless, despite the gag orders and nondisclosure agreements, for the typical federal government whistleblower, the balance generally seems to be in favor of Congressional oversight and transparency because, at least on paper, the law protects most federal government employees who report most types of misconduct. The WPA provides remedies for many federal employees who suffer retaliation for disclosing government misconduct, such as illegal behavior, mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.<sup>272</sup> Although administrative and court decisions have undermined these protections somewhat,<sup>273</sup> on paper, the WPA provides robust whistleblower protection because it protects disclosures on a wide range of misconduct to a broad group of people, including to an employee's supervisor, Congress, or even the press if necessary.<sup>274</sup> Moreover, entities independent of an employee's agency will investigate and adjudicate claims of retaliation, which ultimately could be heard by the judicial branch on appeal.<sup>275</sup>

### *B. Switching the Balance for National Security Whistleblowing*

The laws affecting *national security* whistleblowers differ dramatically from these general provisions. As discussed in more detail below, employees may report misconduct related to national security to

271. Heidi Kitrosser, *National Security and the Article II Shell Game*, 26 CONST. COMMENT. 483, 519 (2010) (quoting Michael D. Shear, *Government Openness is Tested by Salahi Case*, WASH. POST., Dec. 4, 2009, at C7) (internal quotation marks omitted). In non-whistleblower contexts, Obama also asserted executive privilege positions eerily familiar to positions claimed by his predecessor, George W. Bush. See generally Stone, *supra* note 212. For example, President Obama continues to assert the state secrets privilege with regularity, even to defend actions taken by the Bush Administration related to the CIA renditions and the NSA wiretapping. See *id.*

272. See 5 U.S.C. § 2302(b)(8)(A) (2006).

273. See Devine Statement, *supra* note 18, at 13-19.

274. See FISHER, *supra* note 246, at 16-21.

275. See 5 U.S.C. §§ 1201-04 (2006) (describing MSPB); *id.* §§ 1211-14 (describing OSC); *id.* § 7703(b)(1) (providing for review of MSPB decisions by the U.S. Court of Appeals for the Federal Circuit).

a more limited group of people, excluding most of Congress and all of the public. Moreover, less protection from retaliation exists, and the judicial branch has no oversight of retaliation claims because the claims are adjudicated administratively within the executive branch and often within the whistleblower's own agency, if at all.

### 1. The Classification System for National Security Information

A primary reason for the difference in the law's treatment of these types of whistleblowers relates to the different nature of the information being shared by the whistleblowers. A "national security whistleblower" often reveals "classified" information subject to special rules about its disclosure. The classification system for the federal government results from a Presidential executive order describing the various levels of secrecy that applies to certain types of information.<sup>276</sup> Presidents also control whether an individual receives a security clearance providing access to classified information.<sup>277</sup> As a result, whether information is classified, and therefore subject to tighter restrictions on whether and how it can be disclosed, "is almost entirely under the control of the executive branch."<sup>278</sup> Further, the executive branch can utilize criminal prosecution to enforce secrecy related to certain types of classified information.<sup>279</sup> For example, the Espionage Act of 1917, mentioned above, protects the secrecy of national defense information.<sup>280</sup> Presidents claim to derive the power to control

276. See Kitrosser, *supra* note 170, at 890-91 (describing the classification system); KEVIN KOSAR, CONGRESSIONAL RESEARCH SERV., CLASSIFIED INFORMATION POLICY AND EXECUTIVE ORDER 13526, at 3 (2010), available at <<http://www.fas.org/sgp/crs/secrecy/R41528.pdf>> ("[C]lassified information policy largely has been established through executive orders.").

277. See KOSAR, *supra* note 276, at 4 (noting that executive orders typically have defined "who in the federal government may classify information, what levels of classification and classification markings (e.g., 'top secret') may be used, who may access classified information, and how and when classified information is to be declassified"); see also Exec. Order No. 13,526, § 4.1, 75 Fed. Reg. 707 (Jan. 5, 2010) (limiting access to classified information to those who demonstrate eligibility to an agency head, sign a nondisclosure agreement, and have a need to know the information).

278. Kitrosser, *supra* note 170, at 890; see also KOSAR, *supra* note 276, at 5 (noting that Congress passed provision in the Fiscal Year 1995 Intelligence Authorization Act "allowing the President to have a lead role in devising classified information policy").

279. See JENNIFER K. ELSEA, CONGRESSIONAL RESEARCH SERV., CRIMINAL PROHIBITIONS ON THE PUBLICATION OF CLASSIFIED DEFENSE INFORMATION 10 (2011), available at <<http://fpc.state.gov/documents/organization/148793.pdf>> (detailing criminal penalties). It should be noted, however, that the U.S. does not have a criminal statute prohibiting the public disclosure of classified information generally – the statutes prohibit disclosing specific types of classified information. See *id.* In contrast, the United Kingdom has an "Official Secrets Act" that criminally penalizes the disclosure of any government secret. Congress passed a similar act in 2000 but President Clinton vetoed the bill. See *id.* at 25-26.

280. Espionage Act of 1917, 18 U.S.C. §§ 793-99 (2006).

the secrecy of national security information from the Constitution, which appoints the President as Commander in Chief.<sup>281</sup>

Supreme Court holdings provide part of the basis for this view as well. The Court determined in *Department of Navy v. Egan*,<sup>282</sup> that the Merit Systems Protection Board could not review the revocation of an employee's security clearance by an executive agency.<sup>283</sup> In so doing, the *Egan* Court waxed philosophically about the President's constitutional role as Commander in Chief under Article II and asserted that the

authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President, and exists quite apart from any explicit congressional grant.<sup>284</sup>

Moreover, in separate cases, the Court determined that the President, in some circumstances, has a privilege to refuse disclosing to courts confidential communications regarding national security and military issues.<sup>285</sup> Additionally, in *Snepp v. United States*,<sup>286</sup> the Court noted that the government has a "compelling interest" in withholding national security information from unauthorized persons.<sup>287</sup>

However, the Constitution also provides Congress with oversight responsibilities, which leads to an inevitable conflict regarding when the President must provide national security information to Congress.<sup>288</sup> Interestingly, none of the Court's rulings provides the answer to whether the Constitution permits the President to withhold national security information from Congress – as compared to the prohibi-

281. See U.S. CONST. art. II, § 2 cl. 1; see also JENNIFER K. ELSEA, CONGRESSIONAL RESEARCH SERV., THE PROTECTION OF CLASSIFIED INFORMATION: THE LEGAL FRAMEWORK 1 (2011), available at <<http://www.fas.org/sgp/crs/secrecy/RS21900.pdf>> (noting that Presidents, including President Obama, cite constitutional authority when issuing an executive order related to classified information); Kitrosser, *supra* note 252, at 1061-62; Kitrosser, *supra* note 271, at 507; Newcomb, *supra* note 262, at 1239-40; Sulmasy, *supra* note 253, at 1233 ("[T]he founders, as well as many modern administrators in both the twentieth and twenty-first centuries, have strongly insisted that the media, the citizenry, and even Congress are presumptively not privy to most wartime secrets and intelligence activities.").

282. 484 U.S. 518 (1988).

283. *Id.* at 530.

284. *Id.* at 527.

285. See *United States v. Nixon*, 418 U.S. 683, 705 (1974); *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

286. 444 U.S. 507 (1980).

287. See *id.* at 509 n.3.

288. See Kitrosser, *supra* note 250, at 522 (summarizing arguments that Congress has a constitutional role in checking the President's secrecy-keeping powers).



tions against disclosure to the public generally.<sup>289</sup> *Egan* dealt with whether an executive agency had authority to question the security clearance judgment of another executive agency, importantly noting that the Executive Branch has authority in military and national security affairs, “unless Congress specifically has provided otherwise.”<sup>290</sup> *Reynolds* and *Nixon* addressed executive privilege in the context of revealing national security information to litigants and courts, not Congress.<sup>291</sup> *Snepp* held only that the CIA’s contractual requirement that a former CIA agent obtain approval before publishing material related to the CIA was a reasonable way for the CIA to protect its interest in maintaining the “secrecy of information important to our national security.”<sup>292</sup> Thus, the question of how much information Congress can demand from the President regarding national security remains somewhat of an open question as a constitutional matter.

The Security Act of 1947 resolves some of this conflict through a delicate and complicated arrangement that details when the executive branch must share classified information with Congress. Under the Act, the President, the Director of National Intelligence, and the intelligence agency heads must brief Congressional intelligence committees about “intelligence activities” and “any significant anticipated intelligence activity.”<sup>293</sup> Additionally, a smaller group of congressional members, the so-called “Gang of Eight,”<sup>294</sup> receive executive briefings on “covert operations,” when the President considers it “essential . . . to meet extraordinary circumstances affecting vital interests of the United States.”<sup>295</sup> The arrangement becomes complicated because congressional aides and staff members may not have the proper secu-

289. See *ELSEA*, *supra* note 281, at 1 (“The Supreme Court has never directly addressed the extent to which Congress may constrain the executive branch’s power in this area.”).

290. See *Dep’t of Navy v. Egan*, 484 U.S. 518, 530 (1988); see also *FISHER*, *supra* note 246, at 24 (arguing that *Egan* was based on statutory, not constitutional, framework and that Congress has authority to legislate about scope of security clearances).

291. See *United States v. Nixon*, 418 U.S. 683, 705 (1974); *United States v. Reynolds*, 345 U.S. 1, 10 (1953). Moreover, *Reynolds* specifically dealt with executive privilege as an *evidentiary* doctrine, not a Constitutional requirement. See *Reynolds*, 345 U.S. at 6-7.

292. *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980).

293. 50 U.S.C. § 413(a)(1) (2006) (President); *id.* § 413a(a)(1) (Director of National Intelligence and agency heads).

294. See *Kitrosser*, *supra* note 252, at 1053 (noting that the Gang of Eight consists of “the chairmen and ranking minority members of the congressional intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate” and quoting Heidi Kitrosser, *Macro-Transparency as Structural Directive: A Look at the NSA Surveillance Controversy*, 91 MINN. L. REV. 1163, 1204 nn.252-56 and accompanying text (2007)) (internal quotation marks omitted).

295. 50 U.S.C. § 413b(c)(2).

rity clearances (controlled by the executive branch) to receive the information. Also, although congressional members may receive classified information, the law prohibits them from disclosing the information publicly, just as it would anyone else.<sup>296</sup>

National security whistleblowers upset this arrangement because they potentially circumvent these statutory procedures. They might give classified information to congressional aides who do not have appropriate clearance or to congressional members who do not sit on the applicable committees entitled to the information under the Security Act. Moreover, the executive branch traditionally has controlled when and how it conducts such security briefings, procedures undermined by an unauthorized whistleblower. National security whistleblowers run into even greater problems if they disclose classified information publicly (as opposed to Congress), because such disclosure could subject them to employment sanctions, such as dismissal,<sup>297</sup> to civil penalties, and in some cases make them criminally liable under statutes like the Espionage Act.<sup>298</sup>

Thus, whenever Congress insisted on receiving national security information from executive branch employees directly, without control by executive branch officials, Presidents have raised separation of powers objections. For example, in 1996, the Office of Legal Counsel (OLC) concluded that separation of powers principles prevented Congress from providing executive branch employees a “right” to disclose national security information to Congress or anyone else, which in the Administration’s view nullified the Lloyd-LaFollette Act.<sup>299</sup> As noted in the OLC’s memo on this topic,

the President’s role as Commander in Chief, head of the Executive Branch, and sole organ of the Nation in its external relations require that he have ultimate and unimpeded authority over the collection, retention and dissemination of intelligence and other national security information in the Executive Branch. There is no exception to this principle for those disseminations that would be made to Congress or its members.<sup>300</sup>

296. See Stephen I. Vladeck, *The Espionage Act and National Security Whistleblowing After Garcetti*, 57 AM. U. L. REV. 1531, 1545 (2008).

297. Exec. Order No. 13,526, § 5.5, 75 Fed. Reg. 707 (Jan. 5, 2010) (stating that violating government security regulations may result in “reprimand, suspension without pay, removal, termination of classification authority, loss or denial of access to classified information, or other sanctions in accordance with applicable law and agency regulation”).

298. See ELSEA, *supra* note 281, at 11; Vladeck, *supra* note 296, at 1536-37.

299. See Newcomb, *supra* note 262, at 1239-40.

300. Memorandum from Christopher H. Schroeder, Acting Assistant Attorney General, Office of Legal Counsel, to Michael J. O’Neil, General Counsel, CIA (Nov. 26, 1996), *quoted in*

Congress, of course, often disagrees, as in 1997 when it passed an Intelligence Authorization bill with a section stating that “[i]t is the sense of Congress that Members of Congress have equal standing with officials of the Executive Branch to receive classified information so that Congress may carry out its oversight responsibilities under the Constitution.”<sup>301</sup> Other experts, such as Dr. Louis Fisher, the Senior Specialist on Separation of Powers from the Congressional Research Service, agree with Congress because the Constitution does not explicitly provide for how national security information should be regulated.<sup>302</sup> Instead, both Congress and the President have implied powers related to national security, which means that they “share constitutional authority to regulate national security information.”<sup>303</sup>

Like his predecessors, President Obama used separation of powers arguments to justify keeping from Congress secrets related to national security. His Administration objected to congressional proposals to require the executive branch to give certain information related to national security to the full congressional intelligence committees, which would change the current requirement to notify only the so-called “Gang of Eight” Congressional leaders from both parties.<sup>304</sup> Moreover, Obama threatened to veto a revised proposal that would give only generalized information to the intelligence committees, such as informing the committees that more details were provided to the Gang of Eight.<sup>305</sup>

Obama’s Administration also cited separation of powers concerns when testifying to the House of Representatives about the WPEA, which would have provided substantial new rights to national security whistleblowers, telling the committee that, although the Administration supported whistleblower rights generally, “we must preserve the President’s constitutional responsibility with regard to the security of national security information.”<sup>306</sup> The provisions of the

Newcomb, *supra* note 262, at 1240.

301. The Intelligence Authorization Act for Fiscal Year 1998, Pub. L. No. 105-107, § 306, 111 Stat. 2248, 2252 (1997), *quoted in* Newcomb, *supra* note 262, at 1241-42 n.17; *see also* FISHER, *supra* note 246, at 41 (“Congress has never accepted the theory that the President has exclusive, ultimate, and unimpeded authority over the collection, retention, and dissemination of national security information.”).

302. S. REP. NO. 105-165, at 4-5 (1998) *quoted in* Newcomb, *supra* note 262, at 1243.

303. *Id.*; *see also* Halperin & Hoffman, *supra* note 259, at 153 (arguing that the constitutional powers granted to Congress and the President are “independent but concurrent efforts by the respective branches on behalf of national security interests”).

304. *See* Kitrosser, *supra* note 271, at 519.

305. *See id.*

306. De House Statement, *supra* note 195, at 3.

WPEA that would have permitted federal employees to reveal classified information when they believed it related to wrongdoing “would unconstitutionally restrict the ability of the President to protect from disclosure information that would harm national security.”<sup>307</sup>

As a result of the heightened separation of powers concerns regarding national security, the law affecting whistleblowers who disclose problems related to national security differs dramatically from the law for other types of whistleblowers. National security employees receive limited antiretaliation protection and may disclose only a narrow range of wrongdoing to a restricted group of individuals.<sup>308</sup>

## 2. Limited Antiretaliation Protection

The most obvious difference between antiretaliation protection for national security whistleblowers and other whistleblowers relates to the coverage of the WPA. Specifically, the WPA does not protect employees of agencies related to national security, such as the FBI, the CIA, and the National Security Agency.<sup>309</sup> The Act also exempts from coverage employees who possess classified information or, even more broadly, who work in government agencies that likely deal with national security whether or not they handle classified information.<sup>310</sup> Whether they blow the whistle on national security issues or something more mundane, like gross mismanagement, these employees do not receive the WPA-provided right to investigation by the Office of Special Counsel and adjudication in front of the Merit Systems Protection Board, an independent agency outside of their home agency.

Moreover, even employees covered by the WPA who disclose in-

307. See *id.* at 8.

308. This section will describe generally the whistleblower provisions related to national security. For a more detailed description of the variety of laws affecting national security whistleblowers, please refer to FISHER, *supra* note 246, GOODMAN, ET AL., *supra* note 187, Vladeck, *supra* note 296, and Melissa Khemani, *The Protection of National Security Whistleblowers: Imperative but Impossible: A Critical Appraisal of the Scope and Adequacy of Whistleblower Protection Laws for National Security Whistleblowers* (May 30, 2009) (unpublished manuscript), available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1412112](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1412112)>.

309. See 5 U.S.C. § 2302(a)(2)(C)(ii) (2006) (excluding from WPA coverage “the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities”).

310. In particular, the Act excludes employees in positions that are “excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character” or “based on a determination by the President that it is necessary and warranted by conditions of good Administration.” *Id.* § 2303(a)(2)(B). Note that these exceptions explicitly do not include employees of the Department of Homeland Security or the Department of Energy.

formation related to national security may not find much protection because the WPA limits disclosures about classified information by not protecting disclosures “specifically prohibited by law” or “specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.”<sup>311</sup> Typically, this means information designated as “classified” by Executive Order and prohibited by statute from being revealed publicly.<sup>312</sup> Employees can make these types of disclosures only to an IG or the Office of Special Counsel,<sup>313</sup> or perhaps Congress if the Congressional member receiving the information sits on the appropriate committee.<sup>314</sup> The legislative history of the CSRA and the WPA provide some evidence that Congress never intended to protect whistleblowers “who disclose information which is classified or prohibited by statute from disclosure.”<sup>315</sup> Also, the WPA does not prohibit revocation of an employee’s security clearance, which almost certainly would be revoked once an executive branch agency discovered the employee’s whistleblowing.<sup>316</sup> Because many jobs require a certain security clearance, revoking a clearance often equates to a dismissal and leaves the employee with no protection from retaliation.<sup>317</sup>

Some national security whistleblowers may receive antiretaliation protections from other statutes and regulations; however they often provide protections inferior to those provided by the WPA to non-national security whistleblowers. For example, FBI employees who disclose misconduct<sup>318</sup> to various entities within the DOJ<sup>319</sup> may

311. See *id.* § 2302(b)(8)(A).

312. See Vladeck, *supra* note 296, at 1537 (noting that the Espionage Act, 18 U.S.C. § 793(d) (2006), prohibits giving classified national security information “to any person not entitled to receive it”).

313. See 5 U.S.C. § 2302(b)(8)(B).

314. See *id.* § 2302(b)(8) (“This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.”).

315. FISHER, *supra* note 246, at 7 (quoting S. REP. NO. 95-969, at 9 (1978)) (internal quotation marks omitted).

316. See *Hesse v. Dep’t of State*, 217 F.3d 1372, 1380 (Fed. Cir. 2000). *Egan* does not address this issue because Congress amended the Civil Service Reform Act, upon which *Egan* was based, in 1989 and 1994, and the *Hesse* court considered whether Congress had “specifically” addressed the security clearance issue in those amendments, finding that it did not. See *id.* at 1377-80.

317. See S. REP. NO. 111-101, at 34 (2009) (“The effective result of the removal of an employee’s security clearance or the denial of access to classified information typically is employment termination.”); ELSEA, *supra* note 281, at 11.

318. The types of disclosures protected by this provision mirror the WPA’s protected disclosures. See 5 U.S.C. § 2303(a) (2006).

319. The disclosures must be made to the Department’s Office of Professional Responsibility, the IG, the FBI’s Office of Professional Responsibility, the FBI Inspection Division Internal

bring a claim through an internal administrative process if they suffer retaliation because of the disclosure.<sup>320</sup> An administrative office within DOJ conducts an investigation of reprisal claims,<sup>321</sup> and the Director of the Office of Attorney Recruitment and Management (also located within DOJ) may conduct a hearing and award remedies if the employee demonstrates retaliation.<sup>322</sup> The Deputy Attorney General may review the Director's decision, but the regulations implementing the Act do not permit an appeal to court or even the Office of Special Counsel.<sup>323</sup> Although the standards utilized under the FBI's procedures appear similar to the WPA's standards, the entirely internal process can be problematic because of the lack of independence from the process's decision makers.<sup>324</sup> Moreover, the FBI provisions protect only disclosures made within the DOJ; an FBI agent who reports problems to Congress or the public will not receive protection from retaliation.<sup>325</sup>

The Military Whistleblower Protection Act (MWPA)<sup>326</sup> provides similarly limited protections by prohibiting retaliation against members of the military for lawful communications with Congress or an IG<sup>327</sup> as well as for making certain, defined protected disclosures within the military hierarchy.<sup>328</sup> As with the FBI protections, an internal administrative process adjudicates claims of retaliation, ultimately concluding with review by the Secretary of Defense.<sup>329</sup> The process remains entirely internal, and the Act also permits the Secretary of

Investigations Section, the Attorney General, the Deputy Attorney General, the FBI Director or Deputy Director, or the highest ranking official in an FBI field office. *See* Whistleblower Protection for Federal Bureau of Investigation Employees, 28 C.F.R. § 27.1(a) (2011).

320. Although a statute authorizes the FBI protections, see 5 U.S.C. § 2303, administrative regulations detail the procedure and substantive remedies, see 28 C.F.R. Part 27 (2011).

321. *See* 28 C.F.R. § 27.3 (2011).

322. *See id.* § 27.4.

323. *See id.* § 27.5.

324. *But see* Valerie Caproni, *Panel: The Role of Whistleblowers to Facilitate Government Accountability*, 57 AM. U. L. REV. 1243, 1244 (2008) (arguing that the procedures offer a "fairly robust regulatory scheme to protect whistleblowers within the FBI").

325. *See* 28 C.F.R. § 27.1(a) (defining protected disclosure). While I call this process problematic, it did not trouble Valerie Caproni, the FBI's General Counsel in 2008, because "[t]here are enough options [for disclosure] that no employee should feel he or she is in the position of knowing horrible secrets of criminality and have no place to turn." Caproni, *supra* note 324, at 1245-46. Moreover, Ms. Caproni asserted that the DOJ will consider a disclosure made directly to Congress as "protected," even though it "thwarts the statutory scheme." *Id.* at 1248. The regulations, however, do not appear to require this position.

326. *See* 10 U.S.C. § 1034 (2006).

327. *See id.* § 1034(b)(1)(A).

328. *See id.* §§ 1034(b)(1)(B); 1034(c)(2) (defining protected disclosure similarly to the WPA).

329. *See id.* §§ 1034(c)-(g).

Defense to restrict IG investigations in certain intelligence and national security matters.<sup>330</sup> That said, the Department of Defense regulations adopt the whistleblower-friendly standards of the WPA and also improve upon the WPA's standards in one important respect: they permit a remedy for retaliation related to security clearances.<sup>331</sup>

Like many of the whistleblower protections detailed here, the MWPA arose out of a separation of powers dispute. In 1954, President Eisenhower refused to permit Defense Department employees to testify to Congress about conversations between executive branch employees.<sup>332</sup> The Attorney General and the DOJ issued legal memoranda claiming the Constitution permits the President to withhold information from Congress in the public interest.<sup>333</sup> Congress complained that the President was forcing Congress to "rely upon spoon-fed information from the President."<sup>334</sup> Ultimately, Congress passed the MWPA declaring that "No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States,"<sup>335</sup> and subsequently added antiretaliation protections in 1988.<sup>336</sup>

Finally, national security whistleblowers likely have less protection under the First Amendment than other government employees. *Garcetti v. Ceballos*<sup>337</sup> held that the First Amendment does not protect government employees who speak out publicly "pursuant to their official duties."<sup>338</sup> Importantly, the Court also stated that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."<sup>339</sup> Based on this statement, Professor Stephen Vladeck and others concluded that this likely means that the First Amendment does not protect national security employees who disclose classified information, even if about a matter of public con-

330. See 5 U.S.C. app. 3 § 8(b)(2) (2006).

331. Dep't of Defense 5200.2-R, Dept of Defense Personnel Security Program, Subsection DL1.1.30.

332. See FISHER, *supra* note 246, at 22-23.

333. See *id.*

334. See *id.* at 23 (quoting CQ Almanac 740 (1956)) (internal quotation marks omitted).

335. 70A Stat. 80 (1956) (codified as amended at 10 U.S.C. § 1034 (2006)).

336. See FISHER, *supra* note 246, at 23.

337. 547 U.S. 410 (2006).

338. *Id.* at 421.

339. *Id.* at 421-22.

cern.<sup>340</sup> As Vladeck noted,

*Garcetti* also appears to preclude First Amendment protections for any speech made by a government employee that would not have been possible if he were not a government employee, even if the speech itself is not made as part of the employee's official duties.

Where classified national security information is concerned, the stopping point of this logic is immediately clear: National security secrets are, by definition, information to which the average private citizen does not have access. Speech related to national security secrets, then, would seem to fall squarely within the category of speech Justice Kennedy identified in *Garcetti* as falling outside the First Amendment's umbrella.<sup>341</sup>

Construing *Garcetti* more narrowly might permit a national security whistleblower to blow the whistle as a citizen, by disclosing information to the public, such as through the media. However, Vladeck also relied on a 2007 D.C. Circuit opinion to point out that courts will be unlikely to uphold First Amendment protection for a disclosure made with knowledge that "it was unlawfully obtained or leaked."<sup>342</sup> Although a full analysis of *Garcetti*'s impact on the First Amendment rights of national security whistleblowers is beyond the scope of this Article,<sup>343</sup> at a minimum it would appear difficult for a national security whistleblower to claim constitutional protection for revealing classified information.

In sum, with constitutional protection questionable, retaliation protection for national security whistleblowers depends greatly upon the governmental agency for which one works. In the few agencies where statutes and regulations provide some protection, they rarely permit claims to be made outside of the employee's own agency or to be reviewed by a third-party, such as an independent board or a court. Moreover, the protections only extend to "lawful" disclosures of information, which because of the nature of the classification re-

340. See Vladeck, *supra* note 296, at 1540; see also Lee, *supra* note 170, at 1473 (concluding that "insiders" who leak information will have little protection from the First Amendment); Jamie Sasser, *Silenced Citizens: The Post-Garcetti Landscape for Public Sector Employees Working in National Security*, 41 U. RICH. L. REV. 759, 760 (2007) (reaching same conclusion as Vladeck).

341. Vladeck, *supra* note 296, at 1540.

342. See *id.* at 1540 n.50 (citing *Boehner v. McDermott*, 484 F.3d 573, 580-81 (D.C. Cir. 2007)).

343. Whether the First Amendment would protect a national security whistleblower is a topic that deserves its own article, which others have written. See *id.* at 1540 (concluding that First Amendment would not protect national security whistleblowers after *Garcetti v. Ceballos*, 547 U.S. 410 (2006)); see also Lee, *supra* note 170, at 1473 (concluding that "insiders" who leak information will have little protection from First Amendment); Sasser, *supra* note 340, at 760 (reaching same conclusion).



strictions, do not permit national security whistleblowers to disclose misconduct related to classified information to most members of Congress or to the media.

### 3. Structural Disclosure Channels

To counterbalance this inferior antiretaliation protection and in order to have some oversight over the executive branch, Congress developed a variety of structural channels that whistleblowers can use to disclose misconduct. These channels permit some reporting internally to other executive branch officials or entities, and in one limited circumstance, to Congress. However, these channels neither give national security whistleblowers an unrestricted right to report to Congress nor permit them to disclose information to the general public.

The WPA provides a disclosure channel for employees to report misconduct to the Office of Special Counsel.<sup>344</sup> Typically, the OSC provides these reports to agency heads, who must then respond to the allegations with a written report that ultimately will be sent to the President and appropriate members of Congress.<sup>345</sup> The law, however, specifically exempts reports involving foreign intelligence or counter-intelligence information, if the law or an Executive Order specifically prohibits the disclosure.<sup>346</sup> The OSC will send those restricted disclosures to the National Security Advisor and to Congressional intelligence committees, which ends the OSC's involvement in investigating the disclosure.<sup>347</sup>

In Part III.A., *supra*, I discussed the Inspector General Act of 1978, which provides a person within each agency to receive disclosures about the same types of information protected by the WPA: "a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety."<sup>348</sup> After investigating, the IG must report violations of federal criminal law to the Attorney General,<sup>349</sup> and "serious or flagrant problems, abuses, or deficiencies relating to the Administration of programs and operations of such establishment" to the agency head, who must report them to Congress within seven

344. See 5 U.S.C. § 1213 (2006).

345. See *id.* §§ 1213(c); (d); (e).

346. See *id.* § 1213(j).

347. See *id.*

348. See 5 U.S.C. app. 3 § 7(a) (2006).

349. See *id.* § 4(d).

days.<sup>350</sup> Congress later instituted statutory IGs for the CIA<sup>351</sup> and the Department of Defense.<sup>352</sup> In 2010, Congress implemented an overarching IG for the entire intelligence community, charged with coordinating the IGs of each individual intelligence agency as well as conducting its own investigations.<sup>353</sup>

These various IG statutes, however, do not address some specific issues with regard to whistleblowing by members of the intelligence community. As with the WPA, for example, the IG Acts specifically exclude public disclosure of any information prohibited by law, such as classified information.<sup>354</sup> Moreover, although the IGs must provide semiannual reports to Congress and publicly,<sup>355</sup> nothing in the IG Acts provide executive branch employees the right to go directly to Congress, or to the public generally, with concerns about misconduct. In fact, the Act appears to permit the President or the head of an agency to refuse to provide classified information to Congress under the claim of executive privilege.<sup>356</sup> The IG Act for the Department of Defense makes this privilege clear by placing the IG under the “authority, direction, and control” of the Secretary of Defense when the IG engages in an investigation requiring access to information “the disclosure of which would constitute a serious threat to national security.”<sup>357</sup> Furthermore, although sound in theory, the IG system does not completely eliminate the inherent conflict of the executive branch reviewing retaliation claims by its own employees, because a President or an agency head actually appoints, supervises, evaluates and can fire IGs.<sup>358</sup> After the initial IG Act passed, the most glaring problem with the IG system from Congress’ perspective, however, could have been

350. *See id.* § 5(d).

351. *See* 50 U.S.C. § 403q (2006).

352. *See* 5 U.S.C. app. 3 § 8 (2006 & Supp. IV 2010); Newcomb, *supra* note 262, at 1257.

353. *See* The Intelligence Authorization Act for Fiscal Year 2010, Pub. L. No. 111-259, § 405, 124 Stat. 2654 (codified at 50 U.S.C. § 403-3h (Supp. IV 2010)).

354. *See* 5 U.S.C. app. 3 § 5(e)(1).

355. *See id.* § 5(a) (Congress); § 5(c) (public). The CIA IG must provide a classified report to Congress. *See* 50 U.S.C. § 403q(d)(1).

356. *See* Newcomb, *supra* note 262, at 1258-59.

357. *See* 5 U.S.C. § 8(b)(1)(E) (2006). The Act also gives this same control when the investigation requires access to “sensitive operational plans,” “intelligence matters,” “counterintelligence matters,” and “ongoing criminal investigations by other administrative units of the Department of Defense related to national security.” *See id.* §§ 8(b)(1)(A)-(D). The Central Intelligence Agency Act of 1949, which was amended to add a statutory IG for the CIA, has a similar provision permitting the Director of the CIA to prohibit an IG investigation when the “prohibition is necessary to protect vital national security interests.” 50 U.S.C. § 403q(b)(3). A similar provision restricts the new IG for the Intelligence Community. *See* 50 U.S.C. § 403-3h(f)(1).

358. *See* PROJECT ON GOV’T OVERSIGHT, *supra* note 31, at 7.

that, for some reason, the intelligence agency IGs simply did not use the "serious or flagrant" process, and Congress was not getting the information it needed from front-line intelligence agency employees.<sup>359</sup>

To address these limitations, Congress passed the Intelligence Community Whistleblower Protection Act of 1998 (ICWPA),<sup>360</sup> which provides a way for national security whistleblowers to report misconduct related to an "urgent concern." (Because the new Intelligence Community IG statute contains identical provisions,<sup>361</sup> for convenience, I will refer to them collectively as the ICWPA.) These statutes define an "urgent concern" as

(A) A serious or flagrant problem, abuse, violation of law or Executive order, or deficiency relating to the funding, administration, or operations of an intelligence activity involving classified information, but does not include differences of opinions concerning public policy matters; (B) A false statement to Congress, or a willful withholding from Congress, on an issue of material fact relating to the funding, Administration, or operation of an intelligence activity; (C) An action, including a personnel action described in section 2302(a)(2)(A) of title 5, United States Code, constituting reprisal or threat of reprisal prohibited under subsection (7)(c) in response to an employee's reporting an urgent concern in accordance with this section.<sup>362</sup>

Before reporting this urgent concern to Congress, an employee of the intelligence community<sup>363</sup> must disclose the information to the agency's IG or to the Intelligence Community IG. The IG must investigate an "urgent concern" report within fourteen days, determine whether it is credible, and if it is, give the information to the head of the agency or the Director of National Intelligence,<sup>364</sup> who must give it to Congress within seven days.<sup>365</sup> Importantly, the ICWPA permits the employee to report to Congress directly if the IG does not find the employee's report credible or does not provide it to the agency head

359. See Newcomb, *supra* note 262, at 1256 n.61 (quoting a letter from Representative Porter Goss to the heads of the intelligence agencies in which Goss makes this assertion).

360. See The Intelligence Authorization Act for Fiscal Year 1999, Pub. L. No. 105-272, § 701, 112 Stat. 2396 (1998) (containing the ICWPA, codified at 5 U.S.C. app. 3 § 8H); *id.* § 702 (containing an identical provision applicable to the CIA and codified at 50 U.S.C. § 403q(d)(5)).

361. See 50 U.S.C. § 403-3h(k)(5).

362. 5 U.S.C. app. 3 § 8H(h)(1).

363. The ICWPA covers a wide variety of intelligence agencies, including the CIA, the Department of Defense, the FBI, and those designated by the President as having its principal function conducting foreign intelligence or counterintelligence activities. See 5 U.S.C. app. 3 § 8H(a)(1).

364. See *id.* § 8H(b).

365. See *id.* § 8H(c).

accurately.<sup>366</sup> However, in that instance, the employee must tell the agency head about the employee's plan to report to Congress, the employee must follow any instruction from the agency head on how to contact Congress "in accordance with appropriate security practices," and the employee may only give the information to Congressional intelligence committees.<sup>367</sup>

Interestingly, these acts give the appearance of protecting from retaliation employees who report to an IG. For example, the Inspector General Act of 1978 states that no one shall "take or threaten to take any action against any employee as a reprisal for making a complaint or disclosing information to an IG, unless the complaint was made or the information disclosed with the knowledge that it was false or with willful disregard for its truth or falsity."<sup>368</sup> Identical provisions appear in the CIA IG provision<sup>369</sup> and in the new IG act for the Intelligence Community.<sup>370</sup> However, despite such prohibitions, these Acts do not appear to permit employees to file a grievance or a cause of action for such retaliation, which obviously limits the protections' effectiveness.

The ICWPA and the Inspectors General process differ greatly from the whistleblower provisions available to non-security employees under the WPA. Most obviously, they do not provide any substantive protection from retaliation, which likely reduces an employee's willingness to disclose wrongdoing and therefore gives the President almost unchecked authority to keep national security information secret from Congress. Moreover, the ICWPA only addresses misconduct that meets the definition of an "urgent concern," meaning that Congress likely will not hear from intelligence community employees regarding matters that, although important, do not rise to the level of an "urgent concern."<sup>371</sup> Further, under the WPA, any covered executive branch employee can make a protected disclosure to anyone in Congress, while the disclosure options for national security whistleblowers are much more restricted. These differences relate specifically to the separation of powers concerns discussed above.

For example, when negotiating the passage of the ICWPA, the

366. *See id.* § 8H(d)(1).

367. *Id.* § 8H(d)(2).

368. *Id.* § 7(c).

369. *See* 50 U.S.C. § 403q(e)(3)(B) (Supp. IV 2010).

370. *See id.* § 403-3h(g)(3)(B).

371. *See* Sasser, *supra* note 340, at 784.

legislative and executive branches disagreed on whether the act should include a "holdback provision," allowing IGs and agency heads to keep whistleblower information from Congress in extraordinary circumstances to "protect vital law enforcement, foreign affairs, or national security interests."<sup>372</sup> Similarly to the debate in 1978 over the IG Act,<sup>373</sup> the Clinton Administration in 1998 asserted that the presidential privilege required a holdback provision.<sup>374</sup> Congress demurred and chose to leave such extraordinary circumstances to be resolved on a case-by-case basis "through personal communication" between agency heads and congressional leaders.<sup>375</sup>

Yet, even this compromise was laced with indications that each branch maintained its constitutional authority of either oversight, in the case of Congress, or secrecy, in the case of the President. In its legislative findings, Congress specified that the Constitution required it to "serve as a check on the executive branch," with the responsibility to find out about wrongdoing in the executive branch generally and in the intelligence community more specifically.<sup>376</sup> It further declared that "no basis in law exists for requiring prior authorization of disclosures" by the executive branch before an employee could report misconduct to Congress.<sup>377</sup> In contrast, President Clinton issued a statement when he signed the bill noting that the "Act does not constrain my constitutional authority to review and, if appropriate, control disclosure of certain classified information to Congress. . . . The Constitution vests the President with the authority to control disclosure of information when necessary for the discharge of his constitutional responsibilities."<sup>378</sup> In other words, as Thomas Newcomb noted, Congress labeled this compromise "comity," while the President labeled it a constitutional prerogative.<sup>379</sup>

Not surprisingly, the separation of powers issue played a role when Congress recommended the creation of an IG for all of the

372. Newcomb, *supra* note 262, at 1262 (quoting H.R. 3829, 105th Cong. § 2(a)(E) (1998)) (internal quotation marks omitted).

373. See *supra* text accompanying notes 263-68.

374. See Newcomb, *supra* note 262, at 1262.

375. See *id.* at 1264 (quoting H.R. REP. NO. 105-747, at 14 (1998)) (internal quotation marks omitted).

376. See Pub. L. No. 105-272, title VII, § 701(b), 112 Stat. 2413 (1998).

377. See *id.*

378. William J. Clinton, Statement on Signing the Intelligence Authorization Act for Fiscal Year 1999, Oct. 20, 1998, available at Gerhard Peters & John T. Woolley, THE AMERICAN PRESIDENCY PROJECT, <<http://www.presidency.ucsb.edu/ws/?pid=55116>>.

379. See Newcomb, *supra* note 262, at 1265-67.

combined intelligence agencies, with reporting requirements similar to the ICWPA. Similar to President Clinton's reaction to the ICWPA, President Obama objected to reporting requirements imposed upon the new IG and the Director of National Intelligence based on the same constitutional grounds that President Clinton objected to with the ICWPA.<sup>380</sup> Obama not only specifically referenced President Clinton's signing statement for the ICWPA, but also he repeated that he did not view the disclosure requirements as mandating "disclosure of privileged or otherwise confidential law enforcement information."<sup>381</sup> The Obama Administration stated that while it supported expansion of retaliation protections for intelligence community whistleblowers, it also did not want any bill interpreted "to constrain the President's constitutional authority to review and, if appropriate, control disclosure of certain classified information."<sup>382</sup> The Obama Administration stated that it preferred to work out a compromise with Congress on protections for intelligence community whistleblowers through the WPEA in order to address "constitutional and other concerns."<sup>383</sup>

In sum, for national security whistleblowers, the law's balance weighs in favor of secrecy. National security whistleblowers receive less robust protections and have fewer ways to report misconduct than other types of whistleblowers. The distinction President Obama and the law make among whistleblowers is based on the separation of powers tension between oversight and transparency on the one hand and secrecy on the other. Congress wants to encourage employees to disclose governmental misconduct related to national security, while Presidents want to keep vital national security information secret, even from Congress. National security whistleblowers are caught in this crossfire.

#### IV. PROVIDING A BETTER BALANCE

The contradictions and tensions of secrecy are never stronger than in the military stance of nations.

*Sissela Bok (1982)*<sup>384</sup>

380. See *supra* discussion accompanying notes 372-78; Barack Obama, Statement on Signing the Intelligence Authorization Act for Fiscal Year 2010, Oct. 7, 2010, *available at* Gerhard Peters & John T. Woolley, THE AMERICAN PRESIDENCY PROJECT, <<http://www.presidency.ucsb.edu/ws/?pid=88549>> (referring specifically to President Clinton's signing statement).

381. See Obama, *supra* note 380.

382. See Clark, *supra* note 252, at 326 (2010) (quoting OFFICE OF MGMT. & BUDGET, *supra* note 252, at 2) (internal quotation marks omitted).

383. OFFICE OF MGMT. & BUDGET, *supra* note 252, at 2.

384. BOK, *supra* note 12, at 191.

The answer to the second question I posed at the beginning of the Article – does Obama’s distinction make sense? – depends on how one views the inevitable tradeoff society must make between secrecy and transparency in government. As Steven Aftergood, a prominent researcher on secrecy policy for the Federation of American Scientists, asserted, Americans “seem to be of two minds about secrecy.”<sup>385</sup> On the one hand, a democracy abhors secrecy – to govern ourselves and hold elected leaders accountable, we must have access to information.<sup>386</sup> On the other hand, government needs some secrecy to function well.<sup>387</sup> For example, the Supreme Court concluded that some confidentiality assists a President in receiving good advice from advisors, and the importance of such secrecy “is too plain to require further discussion.”<sup>388</sup> The Court went so far as to say that this confidentiality privilege for the Chief Executive “is fundamental to the operation of Government, and inextricably rooted in the separation of powers under the Constitution.”<sup>389</sup> Others have noted the “ever-delicate balance” between transparency and secrecy,<sup>390</sup> for as Professor Heidi Kitrosser observed, “[i]t is hardly news that secrecy has costs and benefits.”<sup>391</sup>

Society seems particularly willing to accept secrecy when it relates to national security. Aftergood asserted that “there is a near universal consensus that some measure of secrecy is justified and necessary to protect authorized national security activities, such as intelligence gathering and military operations.”<sup>392</sup> Sissela Bok, a noted se-

385. Steven Aftergood, *National Security Secrecy: How the Limits Change*, 77 SOC. RES. 839, 839 (2010).

386. See *id.* at 839; see also Halperin & Hoffman, *supra* note 259, at 132 (“The public’s ‘right to know’ has always been a basic tenet of American political theory.”).

387. See BOK, *supra* note 12, at 174 (“[G]overnment secrecy is not always an evil. Among the many kinds of information that modern governments obtain, store, and generate, there are some that nearly all would agree to protect from full publicity [such as] personnel files . . . tentative drafts circulated for discussion within an agency . . . or sensitive explorations of changes in monetary policy . . .”).

388. *United States v. Nixon*, 418 U.S. 683, 705 (1974); see also *id.* (“Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.”).

389. *Id.* at 708.

390. Sulmasy, *supra* note 253, at 1229.

391. See Kitrosser, *supra* note 252, at 1064; see generally BOK, *supra* note 12.

392. See Aftergood, *supra* note 385, at 839; see also Ryan M. Check & Afsheen John Rad-san, *One Lantern in the Darkest Night: The CIA’s Inspector General*, 4 J. NAT’L SEC. L. & POL’Y 247, 247 (2010) (“Gathering intelligence and conducting covert action, by their nature, depend on secrecy.”); Sulmasy, *supra* note 253, at 1232 (“An acceptance of greater government secrecy

crecy scholar, concluded that “every state requires a measure of secrecy in order to defend itself against enemy forces. The legitimacy of such secrecy in self-defense is clear-cut.”<sup>393</sup>

Indeed, in *United States v. Nixon*,<sup>394</sup> although the Supreme Court determined that a President must respond to a subpoena in a criminal case requesting generalized information, the Court indicated the executive confidentiality privilege might require a different result if the issue related to military or diplomatic secrets.<sup>395</sup> In a separate case, the Court upheld a state secrets privilege that permitted the executive branch to refuse to provide information in a case after showing that “compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.”<sup>396</sup> Professor Kitrosser noted that secrecy’s costs and benefits become amplified in the national security context because “they often consist not only of competing values (e.g., democratic openness versus national security) but also of competing means of achieving the same value (e.g., national security through openness versus national security through secrecy).”<sup>397</sup>

Yet, even in this context, too much secrecy can occur. Bok argued that many levels of secrecy undermined the failed helicopter rescue of the hostages in Iran in 1980, including keeping the final decision secret from those in the Carter Administration who thought it was too risky to proceed.<sup>398</sup> Thus, “secrecy directed against military opponents can also come to distort domestic choices . . . [and] can cause reasoning and planning to go astray.”<sup>399</sup> More recently, the 9/11 Commission blamed excessive secrecy for leaving the country vulnerable to attack, because various government agencies’ insistence on se-

is a tacit part of the decision making when any democratic nation commits to engage in armed conflict.”).

393. BOK, *supra* note 12, at 191. Bok also recognized several problems with military secrecy, arguing that “secrecy is as often a weapon in the hands of the aggressors and an aid in every scheme of oppression.” *Id.*

394. 418 U.S. 683 (1974).

395. *See id.* at 710 (noting this distinction and asserting that “courts have traditionally shown the utmost deference to Presidential responsibilities”). The Court hinted that if the information related to “military, diplomatic, or sensitive national security secrets,” it might not even require the President to produce the information for a court’s *in camera* review. *See id.* at 706.

396. *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

397. Kitrosser, *supra* note 252, at 1064; *see also* Erwin Chemerinsky, *Panel: Secrecy and Barriers to Open Government*, 57 AM. U. L. REV. 1234, 1238 (2008) (“The need for Executive Branch secrecy is greatest when foreign policy and national security issues are implicated.”).

398. *See* BOK, *supra* note 12, at 195-96.

399. *Id.* at 196.



crecy led to a lack of inter-agency communication.<sup>400</sup> Secrecy, even in the intelligence community, can undermine accountability,<sup>401</sup> particularly the executive branch's accountability to the legislative and judicial branches. Ultimately, for example, Professor Kitrosser argued for more transparency and less secrecy, noting that "national security based secrecy needs are dramatically overstated" and that secrecy encourages "poorly informed and under-vetted decision-making."<sup>402</sup>

Inevitably, this balancing becomes context-specific. Everyone likely understands the absolute necessity to have kept secret the operation that found Osama bin Laden in May 2011 in order to catch him by surprise.<sup>403</sup> But, fewer people would support classifying documents to hide illegal or embarrassing conduct, particularly if the conduct has only a tangential relationship to national security.<sup>404</sup> Interestingly, whistleblowing in the national security context squarely presents the issue of how best to balance our desire for transparency with our need for secrecy.

#### A. The National Security Whistleblowing Dilemma

An intelligence community employee who leaked information about the bin Laden operation ahead of time would rightly face severe public criticism and likely criminal prosecution, while the same employee blowing the whistle on government corruption in the FBI might receive societal praise.<sup>405</sup> But, examples in the middle of these extremes present problems. What about the whistleblower who ex-

400. See NAT'L COMM'N ON TERRORIST ATTACKS ON THE U.S., THE 9/11 COMMISSION REPORT 417 (2004) ("Current security requirements nurture overclassification and excessive compartmentation of information among agencies.").

401. Check & Radsan, *supra* note 392, at 247.

402. Kitrosser, *supra* note 252, at 1066.

403. See, e.g., Mark Mazzetti et. al., *Behind the Hunt for Bin Laden*, N.Y. TIMES, May 3, 2011, at A1.

404. Cf. Exec. Order No. 13,526, § 1.7, 75 Fed. Reg. 707 (Jan. 5, 2010) (prohibiting the classification of information as secret in order to "prevent embarrassment" or to "prevent or delay the release of information that does not require protection in the interest of the national security").

405. The Deep Throat source for the revelations about Nixon and the Watergate scandal may be a good example of this latter proposition. See generally CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* (1974); see also Susan Page & Mark Memmott, "Deep Throat" Was Ultimate Whistleblower to Some, USA TODAY, May 31, 2005, at 4A (noting that, although some criticized Mark Felt, who was revealed as Deep Throat, others considered him to be the "ultimate whistleblower, a man who saw wrongdoing and exposed it at risk to his own career"), available at <[http://www.usatoday.com/news/washington/2005-05-31-deep-throat-inside\\_x.htm](http://www.usatoday.com/news/washington/2005-05-31-deep-throat-inside_x.htm)>. Notably, TIME magazine named an FBI whistleblower, Colleen Rowley, a "Person of the Year," for trying to reveal government bumbling before 9/11. See Richard Lacayo & Amanda Ripley, *Persons of the Year*, TIME, Dec. 30, 2002, at 31.

poses a government program that is illegal but also one that effectively protects national security? Or one who publicizes wasteful military spending, but also discloses important military intelligence in the process? Answering how best to balance secrecy and transparency to encourage the right type of whistleblowing but to discourage leaks harmful to national security becomes extremely difficult.<sup>406</sup>

In many ways, good reasons exist to support Obama's distinction and treat disclosures related to national security information differently than other types of disclosures. Just as the issue of national security might make us willing to accept a higher level of governmental secrecy, even a whistleblower advocate might also be willing to accept more limited antiretaliation protection for government employees who reveal national security information. The easiest cases would involve leaks of classified information that have little to do with government misconduct. Some might not consider such leakers to be "whistleblowers" deserving protection because, as a definitional matter, a whistleblower believes he or she is revealing illegal, unethical, or improper misconduct in the public interest.<sup>407</sup> For example, the 1998 revelation in the media that the U.S. was tracking Osama bin Laden's satellite phone arguably caused bin Laden to stop using the phone, which of course made him harder to follow and did not reveal any governmental misconduct.<sup>408</sup> Similarly, the U.S. classified documents revealed to WikiLeaks provide some embarrassing and often scandalous information, but they revealed arguably little in the way of illegal government conduct.<sup>409</sup> For example, the State Department cables released by WikiLeaks revealed that Muammar Gaddafi enjoyed the company of "four blond Ukrainian nurses" and that a U.S. diplo-

406. Cf. BOK, *supra* note 12, at 202 (concluding that the question of whether "informed debate and government accountability" can survive in the national security context to be "the most difficult of all those that secrecy raises").

407. See Randy Borum et al., *The Psychology of "Leaking" Sensitive Information: Implication for Homeland Security*, 1 HOMELAND SEC. REV. 97, 97 (2006); Janet P. Near & Marcia P. Miceli, *Organizational Dissidence: The Case of Whistle-Blowing*, 4 J. BUS. ETHICS 1, 4 (1985) (defining whistleblowing as involving the reporting of "illegal, immoral, or illegitimate" behavior).

408. See Porter Goss, *Loose Lips Sink Spies*, N.Y. TIMES, Feb. 10, 2006, at A25 ("The [bin Laden disclosure] was, without question, one of the most egregious examples of an unauthorized criminal disclosure of classified national defense information in recent years. It served no public interest.").

409. See Ginger Thompson, *Competing Portraits in WikiLeaks Case*, N.Y. TIMES, Dec. 23, 2011, at A15 (noting that Manning's lawyers argued in court that none of the leaked information damaged national security). But see *infra* text accompanying notes 425-26 (describing some arguably illegal conduct).

mat called North Korea's former President Kim Jong Il "flabby."<sup>410</sup>

Although serving no interest other than being "anti-secrecy," disclosures like these could damage diplomatic relationships and undermine U.S. government initiatives internationally. In addition to petty disclosures, the State Department cables published by WikiLeaks revealed that Arab countries have requested that the U.S. attack Iran's nuclear facilities, even though those countries publicly promote their relationship with Iran.<sup>411</sup> These cables did not reveal any U.S. misconduct and could be damaging because they disclosed behind-the-scenes communications that differ from some countries' public stances.<sup>412</sup> Secretary of State Hilary Clinton stated that publishing the WikiLeaks' cables "puts people's lives in danger, threatens national security and undermines our efforts to work with other countries to solve shared problems."<sup>413</sup> Such leaks may make the government more transparent, but they hurt national security without serving any other public interest, such as exposing misconduct.

Yet, even when whistleblowers reveal purported wrongdoing, treating national security whistleblowing differently than other types of whistleblowing may make sense as well. National security whistleblowers might disclose damaging information and be wrong about its illegality because national security issues often present nuanced and complicated problems.<sup>414</sup> For example, a Department of Defense employee could release classified information to a reporter about military action he incorrectly believed to be illegal, endangering people's lives and exposing weaknesses that could be exploited by our enemies. Such disclosures cause greater harm than the typical whistle-

410. See Massimo Calabresi, *The War on Secrecy*, TIME, Dec. 13, 2010, at 30, available at <<http://www.time.com/time/magazine/article/0,9171,2034488,00.html>>.

411. See *id.*

412. Cf. *Snepp v. United States*, 444 U.S. 507, 512 (1980) (noting that revealing even unclassified information can harm national interests because "[i]n addition to receiving intelligence from domestically based or controlled sources, the CIA obtains information from the intelligence services of friendly nations and from agents operating in foreign countries. The continued availability of these foreign sources depends upon the CIA's ability to guarantee the security of information that might compromise them and even endanger the personal safety of foreign agents").

413. Calabresi, *supra* note 410. By contrast, Defense Secretary Robert Gates stated, "Is this embarrassing? Yes. Is it awkward? Yes. Consequences for U.S. foreign policy? I think fairly modest." *Id.*; see also Thompson, *supra* note 409 (noting that Manning's lawyers argued in court that none of the leaked information damaged national security).

414. Cf. Richard J. Barnet, *The Ideology of the National Security State*, 26 MASS. REV. 483, 495 (1985) (noting that the topic of national security is "amorphous and seemingly complex"), quoted in Heidi Kitrosser, *What If Daniel Ellsberg Hadn't Bothered?*, 45 IND. L. REV. 89, 95 (2011).

blower disclosure related to financial matters or mismanagement, without creating any offsetting public good by revealing any actual misconduct.<sup>415</sup>

This ambiguity may be compounded because the dangers of the disclosure and the legality of conduct disclosed may not be clear when the information is disclosed. As discussed above, Jeffrey Sterling allegedly told James Risen about government waste and mismanagement in an intelligence program focused on Iran.<sup>416</sup> The government asserted that Sterling's alleged leak involved the disclosure of a human asset, which "placed at risk our national security and the life of an individual working on a classified mission," according to Assistant Attorney General Lanny A. Breuer.<sup>417</sup> On the other hand, Sterling's defenders argue that it involved information about an out-of-date botched undercover mission that did nothing damaging except embarrass the government.<sup>418</sup> In fact, by the time Risen published the book that included information allegedly from Sterling, the government was shutting down the program as a failure costing almost \$100 million.<sup>419</sup> It may be hard to judge whether and how much a leak damaged national security, even years after a leak. Protecting whistleblowers in such ambiguous circumstances may result in too many disclosures of secrets without enough exposure of wrongdoing.

Finally, assuming the employee was right about conduct being illegal, he or she might not understand the larger context for certain government conduct. As the Supreme Court found in a related context in *Snepp v. United States*,<sup>420</sup> "When a former agent relies on his own judgment about what information is detrimental, he may reveal information that the CIA – with its broader understanding of what may expose classified information and confidential sources – could

415. See generally Lee, *supra* note 170, at 1466 n.62 (noting numerous government assertions that leaks caused significant damage to national security); cf. Check & Radsan, *supra* note 392, at 251-52 ("[W]hen the USDA operates ineffective programs or violates the law, the scandals are likely to be contained within the borders of our country and the losses confined to the national treasury. By contrast, when the CIA faces problems, they are likely to implicate our national security, to affect our relations with other countries, and to put lives at risk.").

416. See *supra* text accompanying notes 218-23.

417. Thomas et al., *supra* note 166.

418. See Greenwald, *supra* note 220 ("While there is no good faith claim that Risen's revelation six years after the fact harmed U.S. national security, Risen's story was unquestionably newsworthy because it revealed how inept and ignorant American intelligence agencies are when it comes to Iran.").

419. See Harris, *supra* note 226.

420. 444 U.S. 507 (1980). In *Snepp*, the Court found that the CIA could enforce an agreement with a former employee permitting the CIA to review any of the employee's writings prior to publication, even if the writings did not reveal classified information. See *id.* at 512-16.

have identified as harmful.”<sup>421</sup>

Another example relates to what some have called the “mosaic theory” to support a “state secrets” executive privilege: intelligence may seem innocuous by itself, but will become more important when combined with other seemingly unimportant bits of information.<sup>422</sup> A whistleblower’s inability or unwillingness to see the big picture may lead to the harmful disclosure of national security information. For example, the *New York Times* published WikiLeaks’ Guantanamo files on the internet one week before the raid that killed Osama bin Laden. These files included a document from which bin Laden could have inferred that the U.S. had learned the identity of bin Laden’s courier (and thus possibly where bin Laden was hiding), meaning that “the house [where bin Laden was killed] could have been empty when the SEALs arrived.”<sup>423</sup> Like the Supreme Court in *Snepp*, we might question whether a potential whistleblower should be the person balancing the benefits of revealing the illegality against the costs to our national security from its disclosure.

Yet, exposing illegality, government waste, gross mismanagement, and abuse of authority is just as important in the national security context as in other contexts – if not more so. The whistleblowers who exposed the Bush Administration’s domestic wire-tapping, secret CIA renditions, and waterboarding torture methods revealed important information about arguably illegal activities and also allowed public debate about the way in which the country fought the war on terror.<sup>424</sup> Further, although WikiLeaks published numerous classified documents revealing little in the way of illegality, the website also published a disturbing video about an apparently illegal attack on Afghanistan civilians by a U.S. Army helicopter.<sup>425</sup> One commentator asserted that

many of WikiLeaks’ disclosures over the last 18 months have directly involved improprieties, bad acts and even illegalities on the part of [Secretary of State Hillary] Clinton’s own State Depart-

421. *Id.* at 512.

422. See SCHOENFELD, *supra* note 249, at 213; Christina E. Wells, *State Secrets and Executive Accountability*, 26 CONST. COMMENT. 625, 635 (2010).

423. Graham Allison, *The Biggest Bet*, TIME, May 7, 2012, at 34, 40.

424. See Kitrosser, *supra* note 252, at 1052 (discussing arguments regarding legality of wire-tapping); see also Isikoff, *supra* note 239 (discussing legality of NSA wiretaps); Shane, *WikiSafe*, *supra* note 151, at WK1 (“All those disclosures led to public debate and to action: the prisons were closed; coercive interrogations were banned; the N.S.A. program was brought under court supervision.”).

425. See Shane, *supra* note 132 (stating that Manning was “suspected of passing a classified video of an American military helicopter shooting Baghdad civilians”).

ment. As part of WikiLeaks' disclosures, she was caught ordering her diplomats at the U.N. to engage in extensive espionage on other diplomats and U.N. officials; in a classified memo, she demanded "forensic technical details about the communications systems used by top UN officials, including passwords and personal encryption keys used in private and commercial networks for official communications" as well as "credit card numbers, email addresses, phone, fax and pager numbers and even frequent-flyer account numbers" for a whole slew of diplomats, actions previously condemned by the U.S. as illegal.<sup>426</sup>

The law should not permit illegal conduct to hide behind a veil of secrecy, even in the name of national security.

Additionally, just because a government official labels information as "classified" does not mean it *should* be classified. The government systematically over-classifies documents as "secret."<sup>427</sup> For example, in 2010, the federal government classified almost 77 million documents, a 40 percent increase over the previous year.<sup>428</sup> (Government officials state this increase was due, at least in part, to better reporting by officials.)<sup>429</sup> Steven Aftergood, the scholar on government transparency mentioned earlier, provided a terrific example of the often-incoherent nature of government classification: as of 2002, the government declassified the 1997 and 1998 budgets for CIA intelligence, but kept the budget total from 1947 classified.<sup>430</sup> Journalists and others have argued that government officials "use classification to hide embarrassing information about wrongdoing."<sup>431</sup> Some whis-

426. Glenn Greenwald, *Hilary Clinton and Internet Freedom*, SALON (Dec. 9, 2011, 2:40 AM CDT), <[http://www.salon.com/2011/12/09/hillary\\_clinton\\_and\\_internet\\_freedom/singleton/](http://www.salon.com/2011/12/09/hillary_clinton_and_internet_freedom/singleton/)>; see also Glenn Greenwald, *What WikiLeaks Revealed to the World in 2010*, SALON (Dec. 24, 2010, 4:25 AM CDT), <[http://www.salon.com/2010/12/24/wikileaks\\_23/](http://www.salon.com/2010/12/24/wikileaks_23/)> (providing links to newspaper stories about WikiLeaks revelations concerning U.S. government misconduct).

427. See BOK, *supra* note 12, at 197 ("Mountains of worthless information are stamped Top Secret; levels of secrecy multiply."); Steven Aftergood, *On Leaks of National Security Secrets: A Response to Michael Hurt*, 8 NAT'L SEC. STUD. Q. 97, 97 (2002) ("A considerable quantity of information that is not sensitive is nevertheless formally classified."); William H. Freivogel, *Publishing National Security Secrets: The Case for "Benign Indeterminacy"*, 3 J. NAT'L SEC. L. & POL'Y 95, 99 (2009) ("[T]he government engages in a vast amount of overclassification, which hid damaging information about the mishandling of the Vietnam War and about extensive tapping of telephone conversations without warrants."); Kitrosser, *supra* note 170, at 894 ("There long has been widespread concern across the political spectrum about the existence of rampant overclassification.").

428. See Scott Shane, *Complaint Seeks Punishment for Classification of Documents*, N.Y. TIMES, Aug. 2, 2011, at A16.

429. See *id.*

430. See Aftergood, *supra* note 427, at 98 (calling such inconsistencies "capricious[]").

431. Freivogel, *supra* note 427, at 98. Similarly, Daniel Ellsberg has argued, [T]he apparatus of secrecy serves in very significant part to conceal – from American voters, Congress, courts – policy errors, recklessness, violation of domestic and international law, deception, crimes, corruption in various forms, questiona-

tleblowers, like Daniel Ellsberg perhaps, simply act in "the public interest by exposing important, wrongly classified information."<sup>432</sup>

The government also can exaggerate the harm that comes from revealing classified information.<sup>433</sup> For example, in the Pentagon Papers case, the government claimed that eleven specific secrets the papers revealed would harm peace talks and prolong the Vietnam War if the *New York Times* published them.<sup>434</sup> Later, however, Solicitor General Erwin Griswold admitted that he has "never seen any trace of a threat to the national security from the publication" of the secrets.<sup>435</sup> Similarly, although President Bush claimed that the *New York Times* would have "blood on their hands" if it published the domestic wiretapping story, many have noted that the government has never demonstrated any proof that the publication resulted in damage to national security.<sup>436</sup>

Sometimes national security whistleblowers reveal *unclassified* information, but it relates to national security and thus raises the government's sensitivities. Thomas Drake and others on his behalf asserted that he did not reveal anything related to national security secrets; rather, he exposed government waste and mismanagement.<sup>437</sup>

ble or disastrous judgment, responsibility for catastrophes. The motivations for classifying these are real and strong, not just a reflection of carelessness. But they have to do with considerations of domestic and bureaucratic politics and blame avoidance, not at all with true national security.

Ellsberg, *supra* note 243, at 797; *see also* BOK, *supra* note 12, at 198 ("[T]he appeal to 'national security' offers a handy reason to avoid scrutiny of neglect, mistakes, and abuses.").

432. *See* Kitrosser, *supra* note 414, at 118.

433. *See* Freivogel, *supra* note 427, at 95-96 ("White House and other national security officials routinely exaggerate the dangers of publishing secret information. Over the decades, government officials have presented scant proof of harm from such activities."); Wells, *supra* note 422, at 635 (noting that the "government's tendency to exaggerate national security harms posed by the release of information is well-documented").

434. *See* Freivogel, *supra* note 427, at 112 (describing secrets). As Professor Freivogel noted, These eleven secrets considered to be the most dangerous items within the Pentagon Papers volumes involve sensitive subjects in which the government has a strong interest – diplomatic initiatives, intelligence activities, intelligence estimates and capabilities, and military contingency plans. The government claimed that disclosure of the Pentagon Papers could endanger the lives of intelligence agents and prolong the war, with the resulting death of thousands more soldiers and many prisoners of war.

*See id.* at 113.

435. Erwin N. Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25, *quoted in* Freivogel, *supra* note 427, at 113. An expert at Daniel Ellsberg's trial buttressed this claim by asserting that "at most" 5 percent of the classified material Ellsberg disclosed actually had potential relevance to national security when it originated, and that ½ to 1 percent still had sufficient relevance to justify secrecy protection after two or three years. *See* Ellsberg, *supra* note 243, at 794.

436. *See* Freivogel, *supra* note 427, at 113.

437. *See* Mayer, *supra* note 7, at 55; Greenwald, *supra* note 144 ("Drake's leak involved no conceivable harm to national security, but did expose serious waste, corruption and possible

Similarly, Franz Gayl revealed bureaucratic self-dealing and ineptitude that kept soldiers in Iraq from receiving specially armored vehicles.<sup>438</sup> The Marines, however, revoked his security clearance for relatively innocuous references in a public report about two internal requests for equipment that he made while stationed in Iraq.<sup>439</sup>

In short, society's expectations regarding the relative importance of secrecy or transparency for national security whistleblowers may vary depending on the situation. At times it makes sense to treat national security whistleblowers less protectively than other types of whistleblowers, but at other times we may want to provide more encouragement to them. Developing general rules and legal incentives in this environment can be challenging because the factual circumstances involved vary from case to case.

In Part III, I concluded that the law as it stands now prefers transparency over secrecy for most types of whistleblowers. However, in the face of these factual uncertainties and given the potential devastating consequences for national security, the law has broadly protected secrecy at the cost of transparency and oversight with regard to national security whistleblowers. Reforming the current system to provide more protection for national security whistleblowers in order to increase transparency could undermine our legitimate need for secrecy in some contexts. Yet, this conclusion assumes that we exist in a "zero-sum" world, in which transparency gains only if secrecy loses, and vice versa. In the next section, I question this assumption and explore whether changes to the law affecting national security whistleblowers might alter the scale to provide for more transparency, but without negatively affecting secrecy.

### *B. Suggestions for Reform*

Commentators have identified several different models the law utilizes to encourage whistleblowers.<sup>440</sup> Currently, the law affecting

illegality.").

438. See James Verini, *The Unquiet Life of Franz Gayl*, THE WASH. MONTHLY, Aug. 2011, at 21, available at <[http://www.washingtonmonthly.com/magazine/julyaugust\\_2011/features/the\\_unquiet\\_life\\_of\\_franz\\_gayl030495.php?page=all&print=true](http://www.washingtonmonthly.com/magazine/julyaugust_2011/features/the_unquiet_life_of_franz_gayl030495.php?page=all&print=true)>.

439. See *id.*

440. See Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1154 (2010) (discussing "four prototypical legal mechanisms designed to promote individual reporting: (1) Antiretaliation Protection; (2) Duty to Report; (3) Liability Fines; and (4) Monetary Incentives"); Richard Moberly, *Protecting Whistleblowers by Contract*, 79 COLO. L. REV. 975, 995 (2008) (concluding that some whistleblowers may be protected by an employer's



national security whistleblowers uses three of them – structural disclosure channels, antiretaliation protection, and imposing a duty to blow the whistle – but they have flaws as applied in this context. Indeed, as I discussed above, Congress contemplated revising the law addressing national security whistleblowers during the last several sessions, but could not reach an agreement.<sup>441</sup> In this section, I broadly outline some considerations about each of these models that may inform congressional debate going forward, with the goal of increasing governmental transparency without sacrificing necessary secrecy.<sup>442</sup>

### 1. Enhanced Disclosure Channels

When balancing transparency and secrecy, we should be clear about where those terms are directed: Transparent to whom? Secret from whom? Transparency can mean making government decisions more transparent to the *public*, which we generally desire but which becomes problematic when juxtaposed against the need for secrecy regarding national security. However, we could attain transparency for national security by making executive branch decisions transparent to *Congress*. Such transparency assists legislative oversight, another important value balanced against secrecy. In other words, the need for secrecy in national security affairs might generally trump transparency to the public. However, secrecy should give way to transparency to Congress because of its constitutional responsibility as a check on the executive branch.<sup>443</sup>

Problems in the national security context can become more transparent to Congress through the use of structural disclosure channels for whistleblowers to report misconduct directly to Congress if the executive branch does not address it. Currently, various laws

contractual promise not to retaliate); Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 B.Y.U. L. REV. 1107, 1132 (identifying a “structural model” in which employees may utilize a disclosure channel to report misconduct) [hereinafter Moberly, *Structural Model*].

441. See *supra* text accompanying notes 190-217.

442. I should note that at least one commentator, Professor Stephen Vladeck, believes that the current system works well in the “vast majority of cases.” Vladeck, *supra* note 296, at 1544. However, Vladeck notes that the system does not work well when the highest levels of government appear to approve misconduct. See *id.* at 1544-46 (noting that in these cases “the likelihood that disclosure pursuant to the WPA or the ICWAP (to the extent they apply) will actually allow for meaningful oversight of the program is fleeting, at best”). Vladeck astutely points out that, paradoxically, these are “the cases where whistleblowing is the *most* important – where government employees are involved in an illegal program that has approval from the most senior officials in the relevant agencies and departments.” *Id.* at 1544.

443. See Kitrosser, *supra* note 250, at 522-27; Kitrosser, *supra* note 170, at 916-18.

provide national security whistleblowers ways to disclose wrongdoing internally to an IG, who is located within the executive branch itself.<sup>444</sup> However, Congress will find out about the report only in certain circumstances: (1) through a semi-annual report the IG sends to the agency head, who must pass it on to Congress;<sup>445</sup> (2) if the IG becomes aware of “particularly serious or flagrant problems, abuses, or deficiencies,” and makes a report to the agency head who must send it to Congress;<sup>446</sup> or (3) in response from a demand to report to Congress an “urgent concern,” if the head of an agency permits a whistleblower to talk with Congress.<sup>447</sup> In other words, the law allows for an agency head or IG to filter, and even block, reports to Congress from national security whistleblowers.<sup>448</sup>

Although IGs theoretically provide an independent investigation of whistleblower reports, the President may remove an IG,<sup>449</sup> and IGs typically act under the supervision of an agency head. As an example, the CIA’s IG reports directly to and is “under the general supervision” of the Director of the CIA.<sup>450</sup> Moreover, the Director can prohibit the IG from conducting an investigation into wrongdoing if the Director determines the prohibition “is necessary to protect vital national security interests.”<sup>451</sup> The Director must report this type of order to Congressional intelligence committees,<sup>452</sup> but, again, Congress only receives secondary and filtered information about the disclosure.

The new IG position for the entire intelligence community, described above,<sup>453</sup> resolves some of the inherent tensions of an IG investigating the IG’s own agency because it would permit an investigation from someone outside of a specific agency. But, the law subjects this overarching IG to restrictions similar to those of other IGs, in-

444. See, e.g., 50 U.S.C. § 403q (2006) (CIA IG). The Civil Service Reform Act does assert that employees have a “right” to give information to Congress. See 5 U.S.C. § 7211 (2006). However, that right does not attach to a remedy. The WPA provides remedies for prohibited personnel practices like retaliation, but the WPA does not apply to most members of the intelligence community. See *id.* §§ 2302(a)(1) & (2)(C).

445. See, e.g., 50 U.S.C. § 403q(d)(1) (CIA IG).

446. See, e.g., *id.* § 403q(d)(2) (CIA IG).

447. See, e.g., *id.* § 403q(d)(5) (CIA IG).

448. See Moberly, *Structural Model*, *supra* note 440, at 1121-24 (describing blocking and filtering problems with whistleblower reports).

449. See, e.g., 50 U.S.C. § 403q(b)(6) (CIA IG). If a President removes the IG, the President must provide the reasons for the removal to Congressional intelligence committees. See *id.*

450. See *id.* § 403q(b)(2).

451. *Id.* § 403q(b)(3).

452. See *id.* § 403q(b)(4); 50 U.S.C. § 403-3h(f)(2) (2006).

453. See *supra* text accompanying notes 353-70.

cluding control by the Director of National Intelligence.<sup>454</sup> The Director in charge of intelligence will still control all of the investigation and reporting to Congress. An IG may be a good first option to receive whistleblower disclosures, but the IG cannot be the *only* option because an IG is inherently an internal (rather than external) check subject to the ultimate control of the executive branch.<sup>455</sup> For example, IGs from intelligence agencies offered little assistance during the warrantless surveillance controversy because they did not offer a view on the legality of the program, could not compel testimony, and did not receive support from key members of the Bush Administration.<sup>456</sup> In other cases, such as with CIA renditions and the “enhanced interrogation techniques” used against terror suspects, the press found out about the problems before the CIA IG.<sup>457</sup> Two commentators explained these events by arguing that the IG’s “reputation within the Agency is so low that people risk prosecution [by leaking to the press] rather than merely report their concerns to the authorized internal guard.”<sup>458</sup> As a result, according to some, “[a]gency Inspectors General have proven themselves ineffective defenders of whistleblower rights,” suggesting that Congress require more information on IG investigations to permit enhanced legislative oversight.<sup>459</sup> Indeed, some have argued that during the 1990s and 2000s, congressional oversight of national security issues became “dysfunctional”<sup>460</sup> and “broken”<sup>461</sup> in part because excessive executive branch secrecy kept the right information from getting to Congress.<sup>462</sup>

454. See 50 U.S.C. §§ 403-3h(k); 403-3h(c); 403-3h(f).

455. See Sarah Wood Borak, *The Legacy of “Deep Throat”: The Disclosure Process of the Whistleblower Protection Act Amendments of 1994 and the No FEAR Act of 2002*, 59 U. MIAMI L. REV. 617, 640 (2005) (noting that IGs are theoretically independent but they are placed in the agencies themselves and “lack both decision-making and enforcement powers, which limits the overall effectiveness of the disclosure process”); Kitrosser, *supra* note 271, at 511. Assuming this remains the only option, Check and Radsan make a thoughtful suggestion that an IG’s term could straddle presidencies, like the Director of the FBI who is appointed for a ten-year term, thus reducing presidential influence. See Check & Radsan, *supra* note 392, at 292.

456. See Kitrosser, *supra* note 271, at 511.

457. See Check & Radsan, *supra* note 392, at 288.

458. *Id.*

459. See GOODMAN ET AL., *supra* note 187, at 21. Not everyone agrees. Check and Radsan assert that “[t]he [CIA] IG, straddled between two branches, has enough independence to do the job.” Check & Radsan, *supra* note 392, at 292.

460. NAT’L COMM’N ON TERRORIST ATTACKS ON THE U.S., *supra* note 400, at 420 (“Congressional oversight for intelligence – and counterterrorism – is now dysfunctional.”).

461. DENIS McDONOUGH ET AL., CTR. FOR AM. PROGRESS, NO MERE OVERSIGHT: CONGRESSIONAL OVERSIGHT OF INTELLIGENCE IS BROKEN 15 (2006).

462. See *id.* at 27 (“First and foremost, of course, is that much of intelligence agency work takes place under the shroud of extreme secrecy. Congressional overseers – members and staff alike – do not know what they do not know.”); Kitrosser, *supra* note 252, at 1058-59 (detailing

Whistleblowers can help with that information flow if their information has a more direct route to individuals who can truly investigate complaints should the IG route prove insufficient.<sup>463</sup> Congress needs direct, unfiltered reports from national security whistleblowers if the executive branch does not resolve problems identified by whistleblowers. Some may object to providing a direct line to Congress for fear that it would compromise necessary secrecy regarding national security matters. However, congressional members have relevant security clearances, as do many members of their staff.<sup>464</sup> As important, both the House and Senate have in place procedures to handle classified information.<sup>465</sup> The Security Act of 1947 already contemplates that Congress, through its intelligence committees or the “Gang of Eight,” should receive information about intelligence activities and covert operations.<sup>466</sup> Thus, if the law directed whistleblowers to authorized people in Congress with a procedure set up to handle classified information, then whistleblowers could assist with transparency about national security without a corresponding decrease in secrecy.<sup>467</sup> The transparency would not be to the public generally, but it would be to a separate branch of government constitutionally charged with oversight of the executive branch.<sup>468</sup>

Accepted theory regarding whistleblower disclosure channels also supports permitting reports to Congress. Professor Wim Vandekerckhove has set forth a “three tiered” model for disclosure, in which a whistleblower should first report internally within an organization.<sup>469</sup> The whistleblower should report externally only if the inter-

problems with oversight even when Congress receives classified briefings).

463. See Moberly, *Structural Model*, *supra* note 440, at 1149-50 (describing the benefits of Sarbanes-Oxley’s requirement that corporations install a whistleblower disclosure channel permitting employees to report misconduct directly to the audit committee of the board of directors, which would bypass management blocking and filtering).

464. See Kitrosser, *supra* note 252, at 1073-74, 1077.

465. See *id.* at 1073-75, 1080-84 (describing Congressional rules for handling classified information).

466. See 50 U.S.C. § 413(a)(1) (2006) (noting that the executive branch must keep the “congressional intelligence committees . . . fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity”); *id.* § 413b (providing procedures for informing Congress about covert actions).

467. See Kitrosser, *supra* note 252, at 1075 (“Congress is considered to have a reliable track record for non-leakage and it has a political incentive to avoid leaks in order to avoid blame by the executive branch for the same.”).

468. Cf. BOK, *supra* note 12, at 110 (“Even where persuasive reasons for collective practices of secrecy can be stated, accountability is indispensable.”).

469. See Wim Vandekerckhove, *European Whistleblower Protection: Tiers or Tears?*, in *A GLOBAL APPROACH TO PUBLIC INTEREST DISCLOSURE: WHAT CAN WE LEARN FROM EXISTING WHISTLEBLOWING LEGISLATION AND RESEARCH?* 15, 18 (David Lewis ed., 2010).

nal disclosure does not address the misconduct successfully.<sup>470</sup> If so, the next “tier” of disclosure would be to a regulator, “acting on behalf of wider society.”<sup>471</sup> Congress serves perfectly as the outside regulator to the executive branch because of its oversight obligations and because, to use Vandekerckhove’s words, Congress has “a controlling mandate with regard to [the executive branch], derived directly or indirectly from a political representation of society.”<sup>472</sup> I discuss whether national security whistleblowers should be permitted to disclose to a third tier – the general public – in the final section of this Part.<sup>473</sup>

A second objection to permitting executive branch whistleblowers greater access to Congress, which is more difficult to resolve definitively, involves the current separation of powers *détente* described in Part III. The issue here is not as much about secrecy as about Presidential power to determine if, when, and how the executive branch will give information about national security to the legislative branch. The President’s constitutional prerogatives for secrecy are at their height when national security is at stake. Although Congress has never accepted that the President’s power in this field is exclusive, Congress also has not shown a willingness to challenge such arguments.<sup>474</sup>

It should. First, as a statutory matter, one hundred years ago, Congress gave a “right” to federal employees to give information to Congress, a right currently located in the Civil Service Reform Act that applies to *all* employees – without an exception for intelligence community workers.<sup>475</sup> Supporting that right with statutorily-mandated disclosure channels would seem to fall easily within the power of Congress. Second, as a constitutional matter, Congress has a constitutional role in protecting national security. Professor Kitrosser argued persuasively that the Constitution envisions a “robust struc-

470. *See id.*

471. *See id.*

472. *Id.*

473. *See* discussion *infra* Part IV.B.iv.

474. *See, e.g.* S. REP. NO. 111-101, at 27 (2009) (noting that in the debate over the ICWPA, Congress agreed to modify disclosure requirements “to address the Administration’s concerns” regarding constitutional separation of powers issues); *id.* at 28 (stating that the Senate Committee agreed to alter provisions of the Whistleblower Protection Enhancement Act in response to separation of powers concerns raised by the Obama Administration).

475. *See* 5 U.S.C. § 7211 (2006). The definition of “employee” that applies to all of Chapter 5 of the U.S. Code, unless otherwise indicated, does not have an intelligence community exception. *See* 5 U.S.C. § 2105 (2006). The exclusion for intelligence community employees comes from the WPA, which is located in Section 2302 of Title 5 and describes “prohibited personnel practices” for employees of only certain, non-intelligence, agencies. *See* 5 U.S.C. § 2302(a)(2)(C) (2006). Thus, intelligence community employees have a “right” to give information to Congress, but no remedy if the agency retaliates against them for doing so.

tural checking” by Congress of Presidential power, in which “the executive branch can be given vast leeway to operate in secret, but remains subject to being overseen or otherwise restrained in its secrecy by the legislature.”<sup>476</sup> Allowing Congress to limit Presidential secrecy permits the balancing between constitutional norms of secrecy and transparency required by national security whistleblowers:

On the one hand, the Constitution clearly values transparency as an operative norm. This is evidenced by myriad factors, including the necessities of self-government, the First Amendment, and Article I’s detailed requirements for a relatively open and dialogic legislative process. On the other hand, the Constitution reflects an understanding that secrecy sometimes is a necessary evil, evidenced both by the congressional secrecy allowance [in Article I, section 5, clause 3] and by the President’s structural secrecy capabilities. Permitting executive branch secrecy, but requiring it to operate within legislative parameters, themselves open and subject to revision, largely reconciles these two values.<sup>477</sup>

Louis Fisher, who testified before Congress on this issue, made a similar argument that “Congress has coequal duties and responsibilities for the whole of government, domestic and foreign.”<sup>478</sup> Moreover, this concept is not new. In 1976, Professors Halperin and Hoffman examined the various constitutional powers assigned to Congress and the President and determined that they “necessarily imply independent but concurrent efforts by the respective branches on behalf of national security interests.”<sup>479</sup> Congress provided employees in other areas the ability to give information directly to Congress, and it should expand that right to national security employees as well.<sup>480</sup> The constitutional arguments for presidential secrecy in the national security arena may be persuasive when arrayed against the *public’s* need for transparency.<sup>481</sup> However, when pitted against transparency to Congress to assist with its constitutional oversight responsibilities, the

476. Kitrosser, *supra* note 170, at 917-18.

477. *Id.* at 918; see also Kitrosser, *supra* note 271, at 522-27.

478. See *Protecting the Public from Waste, Fraud and Abuse: Hearing on H.R. 1507, The Whistleblower Protection Enhancement Act of 2009 Before the H. Comm. on Oversight & Gov’t Reform*, 111th Cong. 1 (2009) (statement of Louis Fisher, Specialist in Constitutional Law, Law Library of the Library of Congress) [hereinafter Fisher Statement], available at <<http://democrats.oversight.house.gov/images/stories/documents/20090513183833.pdf>>.

479. Halperin & Hoffman, *supra* note 259, at 153.

480. Moreover, part of providing a real outlet to Congress for whistleblowers also would include requirements that national security agencies make clear *how* an employee or contractor should report wrongdoing. See GOODMAN ET AL., *supra* note 187, at 20 (recommending that agencies “provide the proper guidance to their employees and contractors so they will know how to report their complaints within the law”).

481. See *U.S. v. Nixon*, 418 U.S. 683, 705 (1974).

President's demands for secrecy should be more circumscribed.

Will Congress do anything with more information? Professor Kitrosser also argued that Congress does not actually want to oversee national security issues because "congresspersons are generally best off appearing tough and resolute, while retaining the ability to plead ignorance should things turn out badly."<sup>482</sup> Similarly, Professor Neal Katyal asserted that Congress has abdicated its responsibility of oversight with regard to foreign affairs.<sup>483</sup> However, as a political matter, more direct, unfiltered information from whistleblowers may force Congress to assume its constitutional checking function for fear that not doing so will have greater political ramifications should they ignore the information. As Congress receives better information, it will be harder for it to avoid its oversight role, which can lead to better information for public debate.<sup>484</sup> Moreover, Congress has shown a willingness to undertake official investigations in the past that have pushed for more transparency and served as a countermeasure to the executive branch's tendency for over classification.<sup>485</sup> Further, part of the benefit may be in the deterrent value of whistleblowing.<sup>486</sup> Executive branch actors will know that their decision making may be scrutinized externally, which may lead to better decisions in the first in-

482. Kitrosser, *supra* note 271, at 484. Kitrosser also has argued that

The non-public nature of much information funneling means that "Congressional efforts here remain largely hidden" and thus politically unhelpful to its participants. The complexity of much national security information also diminishes its political resonance. Furthermore, the charge that information disclosure will harm national security is easy to make and has substantial popular appeal, making it politically risky to push for disclosures. Indeed, the current [Bush] Administration frequently makes the charge that congressional hearings on national security will provide "the enemy" with valuable information. Fears that the executive branch will intentionally leak national security information and blame Congress for the leak also have been known to exist on Capitol Hill.

Kitrosser, *supra* note 252, at 1084-85 (citations omitted).

483. See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from within*, 115 YALE L.J. 2314, 2314 (2005). For Katyal, as a result of this abdication, checks and balances must be accomplished from within the executive branch itself. See *id.* Among other things, he proposes an impartial decision-maker that would resolve inter-agency disputes, *id.* at 2337, an idea seemingly adopted by the government in creating the new IG for the Intelligence Community. This enhanced internal oversight may prove to be beneficial, for as Stephen Aftergood has argued, "some of the most effective checks and balances on government operations, including new public disclosures of formerly secret information, take place through the process of internal oversight." Aftergood, *supra* note 385, at 848.

484. See Aftergood, *supra* note 385, at 847 ("The normal friction that accompanies congressional oversight very often serves as a driver of public disclosure.").

485. See *id.* (giving the Church committee investigations of intelligence activities and the 9/11 Commission as examples).

486. See Vandekerckhove, *supra* note 469, at 18 ("The possibility of the second-tier being invoked then serves as a deterrent to the organization.").

stance.<sup>487</sup>

## 2. Retaliation Protection

Structural disclosure channels help address information-flow problems because they direct employees to a recipient who might fix the problem identified by the whistleblower.<sup>488</sup> Yet, for employees to report, the law also should address employee fears of retaliation. Although some minimal antiretaliation protection for national security whistleblowers exists now, several flaws should be fixed to truly encourage whistleblowers and remedy any retaliation they experience.<sup>489</sup>

Currently, as set forth in more detail in Part III.B., *supra*, the law contains several prohibitions on retaliation against national security whistleblowers, but little in the way of remedies for any retaliation. For example, the laws creating an IG for the intelligence community and for the CIA bar any reprisals against employees who disclose misconduct to the IG.<sup>490</sup> However, the statutes do not contain any remedy for retaliation, which leaves national security whistleblowers without much security. Some whistleblowers may have administrative remedies available to them, such as under the act addressing FBI whistleblowers,<sup>491</sup> or the Military Whistleblowers Act.<sup>492</sup> However, these remedies have not worked well in practice: a recent internal Pentagon investigation determined that the Department of Defense's administrative procedures often failed to adequately protect military whistleblowers.<sup>493</sup> Moreover, these procedures do not provide the due process available to other federal government whistleblowers under the WPA: hearings in front of the Merit Systems Protection Board,

487. Cf. Christina E Wells, *Questioning Deference*, 69 MO. L. REV. 903, 937-39 (2004) (describing psychological research showing that "accountability can improve judgment and decision making").

488. See Moberly, *Structural Model*, *supra* note 440, at 1141-50.

489. Cf. Khemani, *supra* note 308, at 4 (concluding that current statutory protections "offer little protection to national security whistleblowers due to narrow judicial interpretations, questionable impartiality of the internal review mechanisms, limited access to external disclosure channels and review bodies, and the lack of effective remedies").

490. See 50 U.S.C. § 403-3h(g)(3)(B) (2006) (IC IG); *id.* § 403q(e)(3)(B).

491. See 5 U.S.C. § 2303(b) (2006); 28 C.F.R. pt. 27 (2011).

492. 10 U.S.C. §§ 1034(c)-(g) (2006).

493. See Inspector General, U.S. Dep't of Def., Assessment Report: Review of the Office of Deputy Inspector General for Administrative Investigations, Directorate for Military Reprisal Investigations 16 (May 16, 2011), available at <<https://www.documentcloud.org/documents/351491-dod-ig-internal-review-of-whistleblowing.html>> (last visited June 23, 2012); see also Tom Vanden Brook, *Report: DoD Delays Endanger Whistle-blowers*, USA TODAY, Feb. 22, 2012, available at <<http://www.usatoday.com/news/military/story/2012-02-22/pentagon-whistle-blower-delays/53198210/1>>.



with an appeal to the Federal Circuit.<sup>494</sup> If a Whistleblower Protection Enhancement Act passes along the lines of the bills that have been proposed recently, many whistleblowers currently covered by the WPA (but still excluding intelligence community whistleblowers) would be able to bring *de novo* claims in federal district court if the MSPB does not resolve their claim within 270 days.<sup>495</sup>

National security whistleblowers should be treated equivalently to other types of federal whistleblowers regarding the substantive and procedural remedies for retaliation. Originally, the WPA excluded intelligence agencies from its coverage “because the intelligence community handles highly classified programs and information that must be closely guarded from public disclosure.”<sup>496</sup> However, the concern that retaliation protection for national security whistleblowers would undermine secrecy confuses two distinct concepts of antiretaliation law: the protected disclosure and the prohibited retaliation. As an initial matter, the law could require national security whistleblowers to maintain the secrecy of their disclosures under the rules set forth by the classification regime. *In addition*, once a whistleblower makes a protected disclosure appropriately, the law could protect the whistleblower from retaliation with a full, or slightly modified, set of remedies.

Therefore, although the disclosure itself could involve classified material, the focus in a retaliation case would be on whether the disclosure caused retaliation – a determination unlikely to involve using details from properly classified materials. The underlying merits of the disclosure (i.e., whether the misconduct reported actually violated the law, which may involve classified information) should not be litigated in a whistleblower case because retaliation law requires only a reasonable good faith belief that the conduct was improper.<sup>497</sup> IGs and

494. See 5 U.S.C. § 1221 (2006) (permitting right of action to MSPB); *id.* § 7703(b)(1) (providing for review of MSPB decisions by the U.S. Court of Appeals for the Federal Circuit).

495. See, e.g., Whistleblower Protection Enhancement Act of 2011, S. 743, 112th Cong., § 117.

496. S. REP. NO. 111-101, at 29 (2009); see also Fisher Statement, *supra* note 478, at 18 (describing Justice Department arguments that national security whistleblower legislation would impede upon the President’s right to determine who has a need to know classified information).

497. See *Protecting the Public from Waste, Fraud and Abuse: Hearing on H.R. 1507, The Whistleblower Protection Enhancement Act of 2009 Before the H. Comm. on Oversight & Gov’t Reform*, 111th Cong. 13 (2009) (statement of David K. Colapinto, Nat’l Whistleblowers Ctr.) (“What is at issue in a retaliation case is whether an employee made a protected disclosure . . . and once that is established there is no in-depth examination of the underlying merits of the whistleblower allegations in the retaliation case.”), available at <<http://democrats.oversight.house.gov/images/stories/documents/20090513184228.pdf>>.

internal processes can handle the investigation of the merits of the disclosure separately from the issue of whether the agency retaliated against the whistleblower.<sup>498</sup> Courts and adjudicatory bodies would not be involved in second-guessing executive branch decisions regarding national security – they would only determine whether the agency retaliated against an employee for a protected disclosure.

In some cases, the employee or the agency may need to use classified material as part of the claim or defense. Accordingly, new anti-retaliation provisions would have to account for maintaining the secrecy of information throughout the adjudication process. However, such systems could be created. Administrative law judges or hearing officers could be cleared for classified information, and evidence could be presented under seal or redacted. Currently, Title VII claims from intelligence community employees receive this type of treatment to protect sensitive information because the law permits them to file *de novo* claims for discrimination and retaliation in federal court.<sup>499</sup> Importantly, these precautions work for Title VII claims; in 1996 the Government Accounting Office (GAO) studied such claims by intelligence community employees and determined that the claims did not compromise national security.<sup>500</sup> The intelligence agencies successfully removed or redacted classified information from adverse action case files, and the GAO determined that agencies often could litigate the case with unclassified documents.<sup>501</sup>

The version of the WPEA endorsed by *candidate* Obama in 2007, H.R. 985 from the 110th Congress, contained provisions that seemed to provide the necessary balance between protecting the security of the disclosure and providing a true remedy for retaliation. The law would have protected national security whistleblowers who disclosed wrongdoing to an authorized member of Congress (or a congressional staff member with appropriate security clearance), an authorized executive branch official, or an IG.<sup>502</sup> Whistleblowers who felt retaliated against could submit a complaint to the IG and the agency head, and the IG would investigate and report to the agency head within 120

498. *See id.*

499. *See* 42 U.S.C. § 2000-e (2006); *id.* § 1981a.

500. U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-96-6, INTELLIGENCE AGENCIES: PERSONNEL PRACTICES AT THE CIA, NSA, AND DIA COMPARED WITH THOSE OF OTHER AGENCIES 45 (1996).

501. *See id.* at 38-39.

502. *See* Whistleblower Protection Enhancement Act of 2007, H.R. 985 110th Cong. § 10(a).

days.<sup>503</sup> The agency head would have 180 days to make a determination about whether retaliation occurred, and after that the employee could bring a *de novo* claim in federal court.<sup>504</sup> H.R. 985 also would have prohibited the revocation of a security clearance as retaliation, an important additional protection not found in the current laws related to national security whistleblowing.<sup>505</sup> Further, the bill would have limited the ability of the executive branch to claim the “state secrets” privilege in a whistleblower case and required a report to Congress whenever the government asserted the privilege in a case.<sup>506</sup>

The most recent iterations of the WPEA in the 112th Congress, S. 743 and H.R. 3289, fall short of these protections. Although the bills provide more protection from retaliation for national security whistleblowers than currently exists, the protection is more limited than it needs to be. For example, the bills protect national security whistleblowers who disclose misconduct only to the Director of National Intelligence or the head of their agency.<sup>507</sup> This limited disclosure channel does not provide for reporting wrongdoing outside of the intelligence community, thus avoiding any meaningful oversight from Congress. Moreover, the bills do not provide any detail regarding how a whistleblower can enforce the antiretaliation protections. Instead, Congress appears willing to let the executive branch provide a regulatory scheme “consistent with” the WPA<sup>508</sup> that permits appeals only to a specially appointed board consisting of intelligence community officials.<sup>509</sup> Moreover, the bills subject security clearance revocations to an internal administrative review process involving the same board.<sup>510</sup> Finally, the proposed laws would authorize the Direc-

503. See *id.* § 10(b).

504. See *id.* § 10(c).

505. The MSPB has determined that it does not have authority to review an agency determination to revoke an employee’s security clearance. See *Hesse v. Dep’t of State*, 217 F.3d 1372, 1380 (Fed. Cir. 2000). The Obama Administration would have appeals of security clearance revocation go to an extra-agency review process rather than federal court, and if the process recommends reinstated the security clearance, then the law could require notification of Congress if the recommendation is not followed by the agency head. See De House Statement, *supra* note 195, at 9-10.

506. H.R. 985 required a court to find in favor of an employee on an element or claim if a “state secrets privilege” claim prevented the employee from proving the element or claim, as long as the IG investigation substantially confirmed the element or elements of the claim. See H.R. 985, 110th Cong. § 10(c) (2007).

507. See, e.g., Whistleblower Protection Enhancement Act of 2011, S. 743, 112th Cong. § 201. The House bill, H.R. 3289, presents identical provisions under identical section numbers. See Whistleblower Protection Enhancement Act of 2011, H.R. 3289, 112th Cong. Title II.

508. See, e.g., S. 743, 112th Cong. § 201.

509. See, e.g., *id.* § 204.

510. See, e.g., *id.* § 202.

tor of National Intelligence to summarily fire employees and to ignore other laws prohibiting the termination of employment when necessary for “national security.”<sup>511</sup>

The dearth of retaliation protection currently makes any proposal for added protection sound good. Indeed, given the current limits of statutory protection when national security whistleblowers use official channels, the system ironically encourages employees to disclose wrongdoing to the press or to sources like WikiLeaks in the hope of remaining anonymous. If a new statute protected disclosures deemed appropriate by the classification regime (such as to Congress, the IG, or an agency head), then the system would encourage appropriate secrecy rather than undermine it. However, the system for protecting against retaliation does not need to be as restrictive as proposed by the bills in the 112th Congress. Permitting adjudication and review of retaliation claims outside the intelligence community would provide less conflicted oversight of the antiretaliation system and likely engender more confidence among employees.

### 3. Whistleblowing as a Duty

Finally, the law often imposes an obligation to report wrongdoing when “the victim of misconduct is particularly vulnerable or the harm will be widespread.”<sup>512</sup> A wide variety of employees, from corporate officers and lawyers to supervisors of facilities that handle hazardous materials have an obligation to disclose harmful activity if they witness it.<sup>513</sup> Experimental evidence supports emphasizing the “duty” model to better encourage employees to blow the whistle, particularly when an employee would perceive the illegal conduct to be reported as morally offensive.<sup>514</sup> Moreover, by imposing a duty to report, the law can express to all employees, and the outside world, “an important message of the social desirability of whistle-blowing.”<sup>515</sup>

The current system imposes a duty on intelligence community employees to blow the whistle on illegal conduct. For example, the federal government’s Code of Ethics adopted by Congress in 1958 requires all employees to “expose corruption wherever discovered” and to “uphold the Constitution, laws, and legal regulations of the United

511. *See, e.g., id.* § 204.

512. Feldman & Lobel, *supra* note 440, at 1163.

513. *See id.* at 1163-66 (providing numerous examples).

514. *See id.* at 1155.

515. *See id.* at 1185.

States.”<sup>516</sup> The Standard of Conduct for executive branch employees requires employees to “disclose waste, fraud, abuse, and corruption to appropriate authorities.”<sup>517</sup> Federal government employees must take an oath to “support and defend the Constitution of the United States.”<sup>518</sup> Anecdotal evidence suggests that these oaths can have some power. For example, Thomas Drake asserts that the oath he took as a federal employee influenced his decision to blow the whistle on mismanagement and waste in the NSA.<sup>519</sup>

Yet, these oaths might conflict with secrecy oaths and written nondisclosure agreements required by intelligence agencies.<sup>520</sup> A national security whistleblower may be confronted with having to decide which oath takes precedence: the oath to expose wrongdoing and uphold the Constitution, or the secrecy promise made when joining the intelligence community.<sup>521</sup> Daniel Ellsberg argued that part of the reason government officials keep secrets about misconduct relates to the psychology of keeping promises of confidentiality in return for being permitted to be a part of an elite, secret-keeping group.<sup>522</sup> The secrecy oaths and nondisclosure agreements become part of the enforcement mechanism that, according to Ellsberg, has “the same

516. See Code of Ethics for U.S. Government Service (1958), available at <<http://usgovinfo.about.com/blethics.htm>>; see also Fisher Statement, *supra* note 478, at 2.

517. U.S. Office of Gov’t Ethics, Standards of Ethical Conduct for Employees of the Executive Branch 2 (2009), available at <[http://www.usoge.gov/Laws-and-Regulations/Employee-Standards-of-Conduct/Standards-of-Ethical-Conduct-for-Employees-of-the-Executive-Branch-\(June-2009\)-\(PDF\)/>](http://www.usoge.gov/Laws-and-Regulations/Employee-Standards-of-Conduct/Standards-of-Ethical-Conduct-for-Employees-of-the-Executive-Branch-(June-2009)-(PDF)/>).

518. 5 U.S.C. § 3331 (2006).

519. See Thomas Drake, *Why Are We Subverting the Constitution in the Name of Security?*, WASH. POST, Aug. 25, 2011, at A13 (“I followed all the rules for reporting such activity until it conflicted with the primacy of my oath to defend the Constitution.”); see also Vic Walter & Krista Kjellman, *NSA Whistleblower Now Silent*, ABC NEWS (July 31, 2006, 4:00 PM), <[http://abcnews.go.com/blogs/headlines/2006/07/nsa\\_whistleblow-2/](http://abcnews.go.com/blogs/headlines/2006/07/nsa_whistleblow-2/)> (reporting that Russell Tice sent a letter to Congress revealing NSA eavesdropping and stating “It was with my oath as a U.S. intelligence officer to protect and preserve the U.S. Constitution weighing heavy on my mind that I reported acts that I know to be unlawful and unconstitutional”).

520. See FISHER, *supra* note 246, at 24-29 (discussing nondisclosure agreements); Jeff Stein, *CIA Director Panetta Warns Employees on Leaks*, WASH. POST., Nov. 8, 2010, at B3, available at <[http://voices.washingtonpost.com/spy-talk/2010/11/cia\\_director\\_panetta\\_warns\\_emp.html](http://voices.washingtonpost.com/spy-talk/2010/11/cia_director_panetta_warns_emp.html)> (quoting CIA Director Leon Panetta reminding CIA officers about their “secrecy oath, which obligates us to protect classified information while we serve at the Agency and after we leave”).

521. See David Canon, *Intelligence and Ethics: CIA’s Covert Operations*, 4 J. LIBERTARIAN STUD. 197, 201-02 (1980) (describing conflict some CIA agents felt between CIA’s secrecy oath and oath to tell the truth to Congress); Blahblog, *National Security Agency Security Oath*, BLOGMOUTH (July 30, 2008), <<http://blogzenze.com/blogmouth/2008/07/30/national-security-agency-security-oath/>> (“I solemnly swear that I will not reveal to any person any information pertaining to the classified activities of the National Security Agency, except as necessary toward the proper performance of my duties or as specifically authorized by a duly responsible superior known to me to be authorized to receive this information.”).

522. Ellsberg, *supra* note 243, at 777-78.

psychosocial meaning for participants as the Mafia code of *omertà*.”<sup>523</sup>

The law should be clear that exposing governmental waste, abuse, and illegality takes precedence over any contractual obligation to keep information secret. The versions of the Whistleblower Protection Enhancement Act in the 112th Congress might help make this unambiguous. The most recent bills contain provisions that require each executive branch nondisclosure agreement to state explicitly that the agreement incorporates and does not undermine the various whistleblower laws and regulations that affect national security whistleblowers.<sup>524</sup> Although these bills have other shortcomings, the provisions related to these nondisclosure agreements should be retained and implemented. Acknowledging the priority of one’s duty to report over the duty of secrecy can reduce the conflict between these opposing obligations and make employees more willing to report misconduct.<sup>525</sup>

Importantly, the WPEA bills also contain a requirement that heads of agencies inform employees how they can make lawful disclosures of misconduct when the disclosure includes classified information.<sup>526</sup> Moreover, the bills require each IG to appoint a Whistleblower Protection Ombudsman to educate employees about antiretaliation protections.<sup>527</sup> Oddly, however, the bills exclude the intelligence agencies from this requirement,<sup>528</sup> an exclusion that should be withdrawn in order to give all executive branch employees information about their duty to blow the whistle. Even without this requirement, some agencies have begun to provide clearer direction to their employees regarding how to report misconduct. On October 12, 2011, the Department of Homeland Security issued a proposed rule-making in which DHS employees would be required to report allegations of waste, fraud, abuse, or corruption to “appropriate authorities within DHS, such as the DHS Office of Inspector General, the appropriate Office of Internal Affairs, or Office of Professional Responsibility.”<sup>529</sup>

523. *Id.* at 780.

524. *See, e.g.*, Whistleblower Protection Enhancement Act of 2011, S. 743, 112th Cong. §§ 104, 115.

525. *See* BOK, *supra* note 12, at 228.

526. *See, e.g.*, Whistleblower Protection Enhancement Act of 2011, S. 743, 112th Cong. § 112.

527. *See, e.g., id.* § 120.

528. *See, e.g., id.*

529. *See* Supplemental Standards of Ethical Conduct for Employees of the Department of Homeland Security, 76 FED. REG. 63,206, 63,207 (proposed Oct. 12, 2011).

Any duty to blow the whistle should correspond with antiretaliation protection that applies when a whistleblower acts pursuant to this reporting obligation. Courts have held that reporting misconduct as part of one's job duty can eviscerate First Amendment and WPA protection from retaliation.<sup>530</sup> In response to these rulings, the WPEA bills also contain provisions rejecting these courts' "job duty" exception for both WPA whistleblowers and national security whistleblowers.<sup>531</sup> These provisions also should be retained.

Utilizing the "duty model" can be effective, but only if the law makes clear to national security employees that the duty to expose misconduct takes priority over the duty of secrecy. To the extent possible, employees should not receive conflicting messages about these dual obligations. However, the law also can make clear that disclosing classified information as part of a whistleblower report should be accomplished in a way that protects the secrecy of the information. The disclosure channels and antiretaliation protections mentioned above work together with this duty to provide a multi-faceted and consistent approach to supporting whistleblower disclosures, while also respecting the need for secrecy regarding national security matters.

#### 4. Extreme Cases

Reforming the three models currently used to address national security whistleblowers can greatly improve the balance between transparency and secrecy by providing more oversight without significantly threatening important secrecy concerns. The law could funnel disclosures to appropriate legislative and executive branch officials without making classified information public. Moreover, the law could remedy retaliation while still respecting important classification concerns. Various versions of the WPEA introduced in Congress over the last few years would improve the current system tremendously. These improvements would encourage disclosures of low-level, or even agency-wide, abuses because people outside the agency would receive information about the misconduct. These recipients would, presumably, correct the misconduct because of their oversight responsibilities.

However, what about the extreme cases involving more wide-

530. See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (First Amendment); *Huffman v. Office of Personnel Mgmt.*, 263 F.3d 1341, 1352 (Fed. Cir. 2001) (WPA).

531. See, e.g., Whistleblower Protection Enhancement Act of 2011, S. 743, 112th Cong. §§ 101, 202.

spread extra-agency wrongdoing or misconduct authorized by the President? As Professor Stephen Vladeck noted, internal whistleblowing channels like those provided by the IG Act and the ICWPA “may not be enough when the relevant program has been approved at the highest levels of the Executive Branch, or when there are other reasons to doubt the impartiality of the relevant Inspector General or the Special Counsel.”<sup>532</sup> Moreover, disclosure to Congress only matters if Congress can do something about the disclosure publicly, which is not always the case.<sup>533</sup> What if a national security whistleblower discloses classified misconduct to the appropriate congressional recipient, but nothing happens?

Vandekerckhove’s three-tier model would suggest that a whistleblower should be permitted to disclose matters of public concern directly to the public if unsuccessful with initial disclosures to the first and second tiers.<sup>534</sup> Otherwise, the executive and legislative branches would not have any accountability “to the wider society” regarding how they address concerns being raised within the branches.<sup>535</sup> In fact, the WPA currently protects disclosures of non-classified information to the media, supporting the three-tier model. However, Vandekerckhove did not address national security issues specifically and, as demonstrated above, such disclosures might require a different balancing than other disclosures.

Despite those secrecy concerns, good reasons exist not to have a wholesale prohibition on national security whistleblowing to the public. An unrestricted ban ignores the public interest side of the transparency-secrecy equation.<sup>536</sup> Moreover, public debate on these issues may be *more* important than on any other, and sometimes leaving oversight to Congress will not be sufficient.<sup>537</sup>

Accordingly, Professor Michael Scharf and Colin McLaughlin suggest that retaliation protection also should be provided to whistleblowers who disclose national security information to the *media* under limited circumstances: if the whistleblower has a “reasonably

532. Vladeck, *supra* note 296, at 1535.

533. *See id.*

534. *See* Vandekerckhove, *supra* note 469, at 18.

535. *See id.*; Halperin & Hoffman, *supra* note 259, at 141 (arguing that government officials who learn about illegal conduct have an obligation to make that information public).

536. *See* A.J. Brown, *Flying Foxes and Freedom of Speech: Statutory Recognition of Public Whistleblowing in Australia*, in WHISTLEBLOWING AND DEMOCRATIC VALUES 86, 94 (David Lewis & Wim Vandekerckhove eds., 2011).

537. *See* BOK, *supra* note 12, at 203 (“Neither committees nor legislative groups meeting in secret to oversee clandestine practices offer sufficient guarantees of accountability.”).



good faith belief that her allegations are accurate and that the disclosure is necessary to avoid serious harm," the whistleblower has "exhausted internal procedures unless she reasonably believes that disclosure would subject her to retaliation, or that the employer would conceal or destroy the evidence if alerted," and the whistleblower "publicly identifies herself as the source of the information."<sup>538</sup> This suggestion has the benefits of protecting disclosures of only the most serious harms to the public and requiring a whistleblower to utilize the first two tiers of disclosure channels before resorting to the media as a last option.<sup>539</sup> Indeed, permitting extreme cases to be disclosed to the media (acting as a proxy for the public at large) serves as an incentive for the government to take seriously a commitment to receiving whistleblower disclosures and remedying the misconduct whistleblowers identify.<sup>540</sup>

However, the information disclosed should be more strictly defined than Scharf and McLaughlin proposed. They suggested that "the harm in question could be physical (e.g., death, disease, or physical abuse), financial (e.g., loss of or damage to property), or psychological (e.g., invasion of privacy, or inducing terror), but lower level harms (e.g., injustice, deception, and waste) would under most circumstances not be sufficient to meet this standard."<sup>541</sup> Although I agree with the goal of only permitting reports to the media of truly "serious" harms, their standard seems too loosely defined to give much predictive value. Instead, the protections should be limited to

538. Scharf & McLaughlin, *supra* note 239, at 579-80; *see also* Khemani, *supra* note 308, at 27 (asserting that "disclosure to the media should only be protected if it is used as a last resort").

539. Porter Goss has argued that "[t]hose who choose to bypass the law and go straight to the press are not noble, honorable or patriotic. Nor are they whistleblowers. Instead, they are committing a criminal act that potentially places American lives at risk." Goss, *supra* note 408, at A25. However, my suggestion assumes one does not "go straight to the press" but rather has tried to disclose the misconduct to the first two tiers available and has been unsuccessful at having the misconduct addressed.

540. Congress might need to amend the Espionage Act to clarify that it does not prohibit the media from receiving and publishing information appropriately received from whistleblowers under any such provision. *See* Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 1000 (1973) (describing arguments that Espionage Act could be interpreted to apply to media disclosures of classified information); Mayer, *supra* note 7, at 57 (noting scholarly arguments that Espionage Act was meant to prevent spying, not mere publication of information).

541. Scharf & McLaughlin, *supra* note 239, at 580.

disclosures about illegality,<sup>542</sup> where the public interest is the highest<sup>543</sup> and when the information should have been classified initially. Like other Executive Orders related to classification, President Obama's EO 13,526 makes clear that classification may not be used to conceal violations of law, inefficiency, administrative error, or to prevent embarrassment to the government.<sup>544</sup> Limiting the disclosures to information that should not have been classified in the first place because it covered up illegality provides an appropriately high burden for the whistleblower (thus discouraging disclosures without sufficient public value) while also recognizing that the classification system serves as the distinguishing feature between national security whistleblowers and other whistleblowers.<sup>545</sup> If the classification system was inappropriately invoked to hide wrongdoing, then it should not prevent whistleblowers from disclosing the information to the public in order to expose the misconduct.<sup>546</sup> The whistleblower should bear the burden of proving improper classification in order to give appropriate deference to the classification process and to protecting important secrecy concerns.

Unlike the reforms related to improved disclosure channels to Congress, stronger antiretaliation protections, and bolder statements about a government employee's duty to report misconduct, neither Congress nor the President appear interested in making it easier to disclose national security information to the media, even under the limited circumstances suggested above. Notably, President Obama does not stand alone politically in his quest to punish leaks of national security information. Democratic Senator Benjamin Cardin introduced legislation to make prosecuting leakers easier by prohibiting the disclosure of any type of classified document – currently the law only prohibits publishing certain categories of intelligence, such as information related to communications technology or nuclear weap-

542. See BOK, *supra* note 12, at 130-31 (arguing that professionals with a duty of confidentiality should still breach secrecy obligations "where serious harm is likely to occur"). Similarly, Daniel Ellsberg suggests that whistleblowers who reveal "criminal behavior" to the press should be immune from prosecution. See Ellsberg, *supra* note 243, at 799.

543. See Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 382 (2011) (arguing that the Supreme Court broadly interprets retaliation statutes because of society's interest "in having the law enforced").

544. See Exec. Order No. 13,526, § 1.7, 75 Fed. Reg. 707 (Dec. 29, 2009).

545. Cf. Kitrosser, *supra* note 170, at 930 ("[J]udgments as to legal impropriety [of disclosure] should not follow automatically from the facts of classification and disclosure.").

546. Cf. BOK, *supra* note 12, at 133 (arguing against confidentiality when used purely as "a means for deflecting legitimate public attention").

ons.<sup>547</sup> The WikiLeaks disclosure of thousands of Afghanistan war documents led to a vitriolic congressional response across the political spectrum: two Democratic Senators scrutinized a bill that would have provided broader protections for reporters who refused to reveal confidential sources in order to ensure that the bill would only apply to “traditional” news sources and not Web sites like WikiLeaks.<sup>548</sup> A Republican Representative asked the State Department to consider WikiLeaks a terrorist group,<sup>549</sup> and a Democratic Senator wanted espionage charges brought against WikiLeaks’ founder Julian Assange.<sup>550</sup>

However, other countries have taken a different view and have provided exemptions to laws prohibiting disclosure of state secrets if the disclosure is in the public interest and it does not damage national security.<sup>551</sup> Some countries, such as Luxembourg, require a showing that the person who disclosed the information intended to damage national security.<sup>552</sup> Moldova and Georgia specifically require a balancing of the public interest against the damage to national security.<sup>553</sup>

Regardless of the approach, the law should account for unusual or extreme circumstances in which both executive branch and congressional actors fail to act appropriately on valid whistleblower disclosures. Ultimately, in those very few circumstances when government actors seem united to hide illegal government conduct, transparency to the public should overcome the natural presumption of secrecy in national security matters.

## V. CONCLUSION

Given the competing principles and factual varieties, can we truly balance secrecy and transparency with the law related to national security whistleblowers? These are complex issues, and cases like Thomas Drake should make Congress and President Obama reconsider whether the current balance skews too far toward hiding im-

547. See Espionage Statutes Modernization Act of 2011, S. 355, 112th Cong.; see also Benjamin, *supra* note 155.

548. Charlie Savage, *After Afghan War Leaks, Revisions in a Shield Bill*, N.Y. TIMES, Aug. 3, 2010, at A12.

549. See Shane, *supra* note 151.

550. See *id.*

551. See DAVID BANISAR, LEGAL PROTECTIONS AND BARRIERS ON THE RIGHT TO INFORMATION, STATE SECRETS AND PROTECTION OF SOURCES IN OSCE PARTICIPATING STATES 22 (2007) (providing examples such as Denmark and Austria).

552. See *id.*

553. See *id.*

portant information about misconduct from Congress and the public. Statutory whistleblower provisions either exclude national security employees explicitly or only half-heartedly encourage them to blow the whistle on misconduct. By erecting ineffective measures, perhaps we have failed to address either branch's concerns because the law neither fully encourages whistleblowers to go to Congress nor adequately maintains the secrecy that is needed for some state secrets.

Other reforms could increase transparency and address some of the flaws in the secrecy system. With regard to the over classification problem, the law could make it easier for employees to object to information being classified and to protect them from retaliation when they do.<sup>554</sup> The Espionage Act could be amended to make prosecuting whistleblowers more difficult by requiring the prosecution to prove the whistleblower meant to harm national interests and by permitting a defense that the information released was improperly classified because, for example, it was classified in order to conceal illegality or embarrassing information.<sup>555</sup> Congress could provide reporters a statutory privilege not to reveal sources.<sup>556</sup> Legislation could limit the use of the state secrets doctrine to avoid civil lawsuits by whistleblowers.<sup>557</sup> Entire articles can be, and have been, written on these topics. For now, I just note that there are many moving parts to the issue of how best to encourage transparency and to protect needed secrecy. A comprehensive approach does not appear forthcoming, but perhaps if Congress and the President address the needs of national security whistleblowers by strengthening the models described above, then other reforms may follow.

554. Obama has taken steps to reduce the chronic overclassification problem. For example, he established the National Declassification Center to expedite declassification decisions. See Exec. Order No. 13,526, § 3.7, 75 Fed. Reg. 707 (Dec. 29, 2009).

555. Stephen Vladeck and others have suggested a statute specifically designed to address leaks to the media, including a provision permitting a defendant to argue that the information leaked should not have been classified as secret. See Halperin & Hoffman, *supra* note 259, at 145 (arguing, in 1976, that the law should prohibit any criminal sanction or administrative penalty for someone who releases improperly classified information); Shane, *supra* note 9 (quoting Vladeck). Currently, classification may not be used to conceal violations of law, inefficiency, administrative error, or to prevent embarrassment to the government. See Exec. Order No. 13,526, § 1.7, 75 Fed. Reg. 707 (Dec. 29, 2009).

556. See, e.g., Jonathan Peters, *WikiLeaks Would Not Qualify to Claim Federal Reporter's Privilege in Any Form*, 63 FED. COMM. L.J. 667, 688-94 (2011) (describing congressional legislation related to a proposed reporter's privilege).

557. See GOODMAN ET AL., *supra* note 187, at 20.